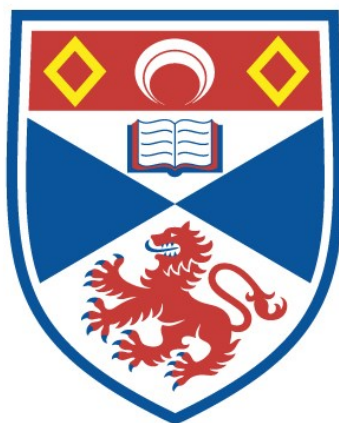


STABILITY OR RENEWAL: THE JUDICIALISATION OF REPRESENTATIVE DEMOCRACY IN AMERICAN AND GERMAN CONSTITUTIONALISM

David Jonathan Miles

**A Thesis Submitted for the Degree of PhD
at the
University of St Andrews**



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The Judicialisation of Representative Democracy in
American and German Constitutionalism**

David Jonathan Miles



University of
St Andrews

This Thesis is Submitted in Partial Fulfilment For

The Degree of PhD

at

The University of St Andrews

December 2016

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Abstract

This thesis examines how American and German constitutionalism, as shaped by the U.S. Supreme Court and the German Constitutional Court (*Bundesverfassungsgericht*), have mediated the tension between threats to stability and the imperative of renewal through occasional or constant interventions in their democratic processes. To do this, it primarily assesses the 1960s U.S. reapportionment cases and the European Parliament electoral threshold cases of 2011 and 2014. It also considers the ideas of four thinkers, theorists and jurists who have wrestled with the dilemma of how to maintain the bond between citizen and state: Ernst-Wolfgang Böckenförde, Hannah Arendt, Thomas Jefferson and Alexis de Tocqueville.

Stability and renewal represent the twin orientation points for constitutionalism and the courts against which they must adjust to possible democratic threats, or new political and social forces in need of recognition. Threats to the state can emerge either from a surfeit of illiberal views in politics and society aimed at destroying an existing constitutional order, or when democratic channels become starved of new opinions through the constitutional or unconstitutional exclusion of voters and parties.

A distinctive feature of the approach taken is the conceptual division between the ‘legal/institutional’ space in which the Supreme Court and *Bundesverfassungsgericht* interpret constitutional meaning, and the ‘civic space’ in which citizens accept or reject constitutional meaning. One central question is how American and German constitutionalism, and the U.S. Supreme Court and *Bundesverfassungsgericht* shape and influence the vital civic space that is integral to the democratic relationship between citizen and state, and the survival of the state itself. Ultimately it is concluded that without acceptance of the importance of law and constitutionalism by citizens in the civic space, the influence of the Supreme Court and the *Bundesverfassungsgericht* becomes purely institutional and effectively consigned to the courtroom.

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Abbreviations and German Terms

AfD –Alternativ für Deutschland (German Eurosceptic Party)

Bundesverfassungsgericht / *BVerfG* – Federal Constitutional Court

CDU – Christian Democratic Union (Party of Konrad Adenauer and Angela Merkel).

EP – European Parliament

EPII – European Parliament II Case (2011)

EPIII – European Parliament III Case (2014)

FCCA – Federal Constitutional Court Act

FRG – Federal Republic of Germany (previously West Germany)

GDR – German Democratic Republic (East Germany)

Grundgesetz (Basic Law) – West Germany’s constitution established in 1949 and since reunification in 1991 the constitution of a united Germany.

KPD – Communist Party of Germany (Banned by the *BVerfG* in 1956)

LWV – The League of Women Voters

NS Zeit – Commonly used German expression describing the National Socialist Period

Organstreitverfahren – Organ of State Proceedings / Complaints

PDS – Democratic Socialist Party (Former ruling party of the GDR)

SRP – Socialist Reich Party (Banned by the *BVerfG* in 1952)

SPD – Social Democratic Party of Germany (Party of Willy Brandt and Helmut Schmidt)

Verfassungsbeschwerden – Constitutional Complaints

Die Vergangenheitsbewältigung – A term that is difficult to translate literally, that is used to describe the debate and the process of coming to terms with the Nazi past which began in the late 1950s and 1960s.

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Chapter 1 - Introduction

Non sub homine, sed sub deo et lege. (Bracton)

Here each individual is interested not only in his own affairs but in the affairs of the state as well: even those who are mostly occupied with their own business are extremely well informed on general politics - this is a peculiarity of ours: we do not say that a man who takes no interest in politics is a man who minds his own business; we say he has no business here at all.¹ (Pericles' Funeral Oration)

A constitution is a standard, a pillar, and a bond when it is understood, approved and beloved. But without this intelligence and attachment, it might as well be a kite or balloon, flying in the air.² (John Adams)

¹ M. I. Finley and Rex Warner, *Thucydides: History of the Peloponnesian War*, (Harmondsworth: Penguin Books, 1972), p. 147.

² Cited in Hannah Arendt, *On Revolution*, (Harmondsworth: Penguin, 1973), p. 146.

Constitutionalism in Germany and the United States reflects different forces, threats and unique historical experiences, yet common to both is Carl Friedrich's idea that it is "rooted in certain basic beliefs; the belief in the dignity of man and in the belief of man's inclination to abuse power."³ American and German constitutionalism have been primarily concerned with the attempt to constrain public power in the name of the people. Stephen Griffin notes that "modern constitutionalism involves a tension between the constituent power of the sovereign people and the constitutional forms that are intended to express and check this power."⁴ The manifestation of the people in constitutional, democratic and social forces has shaped political and legal institutions and the evolution of states. Yet constitutionalism is also, I suggest, oriented towards a view that 'the people' are, and remain, an unpredictable force, sometimes requiring restraint, at other times in need of protection and representation.

The establishment of stability is generally common to constitutionalism in different countries. But the degree of stability constitutionalism in a particular country seeks and the tools it uses to preserve it may differ. The ability of citizens in modern liberal democracies to plan their lives with minimal state interference presupposes a certain level of political stability. Since the late eighteenth century one clearly accepted basis for the establishment of both political stability and a sphere of private autonomy for citizens immune from state interference is the crafting of a written constitution. The "special virtue of constitutionalism," writes Richard Kay, "lies not merely in reducing the power of the state, but in effecting that reduction by the advance imposition of rules."⁵ Such criteria allow the subject of state power

to place every planned action in one of two categories, one subject to undoing by the state, the other immune to such authority. [...] Within that second category, however narrow, a person may construct his or her own life.⁶

Of course, while constitutionalism can provide some stability for the state and the individual, so too could a totalitarian system; albeit, one involving far more stability for the state than the individual, for whom the midnight knock at the door from the

³ Carl J. Friedrich, *Limited Government : A Comparison*, (Englewood Cliffs ; London: Prentice-Hall, 1974), p. 123.

⁴ See for example Stephen M. Griffin, 'Constituent Power and Constitutional Change in American Constitutionalism', in *The Paradox of Constitutionalism : Constituent Power and Constitutional Form*, ed. by Martin Loughlin and Neil Walker (Oxford ; New York Oxford University Press, 2007), p. 49.

⁵ Richard S. Kay, 'American Constitutionalism', in *Constitutionalism: Philosophical Foundations*, ed. by Lawrence A. Alexander (Cambridge ; New York: Cambridge University Press, 1998), p. 23.

⁶ Ibid. pp. 23-24.

authorities remains a remote but fearful prospect. Within a liberal democracy governed according to the precepts of constitutionalism, however, a civic space must also be permitted for the emergence of new opinions and the associated values which these opinions reflect, embody and draw sustenance from. Moreover, the very concept of a liberal democracy presupposes that an opinion and the values it reflects should have a chance to become more widely accepted, even to become a majority opinion.⁷ Constitutionalism, however, has something to say about how opinions emerge in a society for as a mechanism for government and as a concept, it is decidedly *not* value neutral.

Threats to the stability of the liberal state can emerge when the civic and democratic space is allowed to ‘boil over’ with opinions which may be illiberal or aimed at attacking and destroying the existing constitutional order.⁸ Equally, the liberal state may be at risk when the democratic processes become starved of either new opinions, or when oligarchical tendencies in a political system seek to exclude certain voters, parties, and minority groups, constitutionally and unconstitutionally, from democratic participation. Striking the appropriate balance between these two poles of stability and renewal has been, I contend, a central concern of American and German constitutionalism as understood by the U.S. Supreme Court and Germany’s Federal Constitutional Court, the *Bundesverfassungsgericht* (BVerfG).

I shall generally argue that American and German constitutionalism have been primarily concerned with mitigating the threats to the liberal state, either from individuals and groups being able to participate in the democratic process without restraint, or from their not being able to participate enough. This raises the question of how the particular characteristics of American and German constitutionalism shape the civic space within which political participation and the formation of majority opinions takes place. When people are excluded from that space by their communities or the state itself through the denial of the vote, what should the response of constitutionalism be? If too many of the wrong opinions are bad for the liberal state and too few of the right opinions are equally bad, how do we decide what is ‘just right’?⁹ What is ‘right’, as will

⁷ Tim Koopmans, *Courts and Political Institutions: A Comparative View*, (Cambridge University Press, 2003), p. 123.

⁸ See for example Arendt, p. 93. In the eyes of the American founders, observes Arendt, “the rule of public opinion was a form of tyranny.”

⁹ The men of the American Revolution, wrote Arendt, “knew that the public realm in a republic was constituted by an exchange of opinion between equals, and that this realm would simply disappear the

be assessed in Chapter 2, is greatly determined by whether opinions are in conformity with the particular facets of America's 'liberty' oriented constitutionalism and Germany's 'dignity' oriented constitutionalism. In other words, this analysis is based not on a Dworkin type 'moral' or normative reading of constitutional principles, but on whether certain court decisions can be said to be in conformity with the understanding of American and German constitutionalism outlined in the succeeding chapters. One important focus for the analysis in the legal case studies in Chapter 5 and Chapter 7 is the role of each court in supporting voters, groups or parties that have been excluded, unconstitutionally and constitutionally, from the political process.

The thesis is thematically divided on several levels which are useful conceptually. Most obviously is the dichotomy between stability and renewal which is a constant thread in the succeeding chapters, representing constitutionalism's orientation point, or rear view mirror, against which it must adjust to possible democratic threats, or new social and political forces in need of recognition. Put slightly differently, the focus throughout the thesis is on both the *civic* space where individuals fight for access to the political process, contest constitutional meaning, and uphold, challenge, or destroy their government, and the *legal / institutional* space within which particular conflicts over issues such as voter exclusion must be resolved in the courts. It is the civic space which is crucial to the quality of, and survival of, the state. The degree to which American and German constitutionalism, and each court, can exert influence over this civic space is a key question as we proceed. As I will suggest, this question is partly dependent on whether law and constitutionalism are accepted in the relevant national, or local, civic space.

A common theme with respect to both countries which, I argue, holds in many Western liberal democracies is that representative democracy has become almost entirely detached from any civic and communal sphere. This carries serious implications if citizens cannot connect the significance of their votes in the ballot box every four years with their communities and their own lives. Such disengagement breeds apathy, recklessness and also contempt for the principle of equal respect which constitutes the very basis of citizenship.

very moment an exchange became superfluous because all equals happened to be of the same opinion." Ibid.

This thesis examines how various thinkers, and the political and legal institutions of the United States and Germany have wrestled with this existential dilemma. The particular emphasis of each country has largely been determined by its approach to constitutionalism, and how the polis upon which the survival of the state depended was constituted. As will be examined in Chapter 2, while the American concept of what I term ‘liberty’ constitutionalism generally left the creation of the polis with the people by simply fencing off the state and letting the people ‘get on with it’, Germany’s normative ‘dignity’ oriented constitutionalism left the creation of the polis in the hands of the *BVerfG*. This difference is central to how the values of the respective ‘constitutionalisms’ are mediated and interact with more traditional forces of identity and social cohesion. Crucially, the liberty-dignity distinction also determines how interventions in the processes of representative democracy by the courts occur, and whether values arising from social struggles are merely ‘formalised’ as law in court decisions, or whether the values of a predominantly normative constitution are ‘inculcated’ in state institutions and society.

1.1 Overview

One of the complexities of constitutionalism is the division between a constitutional charter to keep a government in order and the need for a state to update its understandings and prevailing value orientations by successfully mediating the political, civic and social space within which opinions become more widely held or more widely rejected. Michael Brenner argues that

the modernity and success of a constitution [...] depends on whether it proves able to facilitate social and political changes and thus the formation of the future quite independently from daily political routine and changing times.¹⁰

The development of American constitutionalism has been driven to a far larger extent than its German counterpart by evolving currents in society and politics. This should not on one level be a surprise. A glance at the twenty-seven ratified constitutional amendments reveals a historical record of the struggles for equality, the fruits of a slowly expanding suffrage, and of a government that slowly responded to the developments of a maturing society.¹¹ That part of the egalitarianism of America’s

¹⁰ Michael Brenner, ‘The Constitutional Framework of Democratic Representation’, in *Constitutionalism, Universalism and Democracy: A Comparative Analysis*, ed. by Christian Starck (Baden-Baden: Nomos-Verlag-Ges., 1999), p. 136.

¹¹ The Reconstruction amendments after the Civil War, and the Seventeenth (direct election of senators)

founding documents was, as Justice William Brennan put it, “more pretension than realised fact”¹² is hardly contentious. Yet if the divergence between the values suggested by the Constitution and those emanating from political and societal practice is so plain, we are left with the simple but crucial question of whether theory and ideals have the political force to drive praxis, or the reverse?¹³ However, if society’s values are the driving force behind law and politics, then the moral fate of a constitutional order would be determined largely by whether society’s direction of travel is towards progress and human dignity, or a more unpleasant direction.

Reduced to its core, this is essentially a question of value strength: whether citizens identify more with their constitutional values or “internal bonding forces”¹⁴ such as religion, nation or other forms of identity. As will be illustrated, these internal bonding forces can sometimes reinforce constitutional values and principles of democratic engagement, or they can weaken them. Where they point in significantly different directions, such as during the Weimar Republic—where nation was a more potent force of social cohesion than constitutional values—then, as Böckenförde notes, the liberal state is vulnerable, particularly in a “time of crisis”¹⁵. This discussion will be expanded upon at length in Chapter 3, which examines the contestation and interdependence between constitutional and traditional values, and their effects in reinforcing or weakening the liberal state and its democratic relationship with its citizens. It does this with reference to the ideas of Ernst-Wolfgang Böckenförde, Hannah Arendt, Alexis de Tocqueville, and Thomas Jefferson.

A constitution is a legal as well as political instrument. For constitutionalism to be sustained, it has to enjoy the confidence of enough people in society who must be willing to sacrifice their will on some issues to ensure that their own rights are protected

and Nineteenth (equal suffrage for women) Amendments are some examples. See also Richard Bellamy, *Political Constitutionalism : A Republican Defence of The Constitutionality of Democracy*, (Cambridge: Cambridge University Press, 2007), p. 135.

¹² William J Brennan Jr, 'The Constitution of the United States: Contemporary Ratification', in *Interpreting the Constitution : the Debate over Original Intent*, ed. by Jack N. Rakove (Boston: Northeastern University Press, 1990), p. 23.

¹³ German constitutionalism in the form of the militant democracy might suggest this question is irrelevant because it assumes that constitutional institutions such as the *BVerfG* are there for those moments when illiberal forces are in the ascendancy. However, for such institutions to have the force to be able to suppress illiberal tendencies, even in opposition to the popular will, necessarily means as Böckenförde pointed out, that the liberal state can only guarantee itself by sacrificing its liberalness. See Ernst Wolfgang Böckenförde, 'The Rise of the State', in *State, Society, and Liberty: Studies in Political Theory and Constitutional Law*, (New York; Oxford: Berg Pub Ltd, 1991), p. 45.

¹⁴ Ibid. p. 46.

¹⁵ Ibid.

on some issues where they might not be in the majority. This highlights, of course, the problem of how one assesses majoritarianism in practice since theoretical accounts tend to elide the reality of how groups in society coalesce on some issues and break apart on others.¹⁶ As Richard Bellamy puts it, “most majorities turn out to be shifting coalitions of minorities.”¹⁷ For the members of any political community, as Lawrence Sager notes, “there is the certainty that some questions of considerable importance will be decided against their interests” and this includes democracies where someone may be on the losing side in elections or in legislative votes.¹⁸

This picture reflects the experience in Western liberal democracies since 1945, where being on the losing side over a particular issue did not result in incarceration or a more unpleasant fate. For the purposes of the present enquiry, however, the elephant in the room remains 1930s Germany. Hitler never secured a majority of the popular vote, either in the election before or after the National Socialist power grab in January 1933.¹⁹ One lesson that post-1949 German constitutionalism learned from 1930s Germany is that tyrannies can take hold even absent majority support. The Nazis required only the legitimacy which the organs of state authority provided to complete their dismantling of constitutional democracy. The 1960s reapportionment cases examined in Chapter 5 tell a similar story. While the malapportioned state legislatures fell some way short of Nazi tyranny, by January 1962, 45 states across the United States were under the control of state legislatures, where majority control of at least one house could be theoretically achieved with legislators representing less than 40 percent of the state population.²⁰

As we will see in Chapter 3 and later chapters in the context of Germany’s recovery after 1945, constitutional dangers for the fledgling Federal Republic were identified in 1964 by Ernst-Wolfgang Böckenförde, a political theorist, protégé of Carl

¹⁶ See for example William R Bishin, 'Judicial Review in Democratic Theory', *S. Cal. L. Rev.*, 50, (1977).p.1103. “Voters usually have no choice but to vote for candidates with whom they disagree on some issues.” As Dahl said “[O]n matters of specific policy the majority rarely rules.” Preface to *Democratic Theory*, 124. Cited in Bishin, p.1103. See also *Mediation Committee Seat Assignment Case*, 112 BVerfGE 118 (2004). Here the court ruled that the majority principle “forms a ‘political’, not a legal, category only constituting itself each time for case to case.”

¹⁷ Bellamy, p. 75.

¹⁸ Lawrence Sager, 'The Domain of Constitutional Justice', in *Constitutionalism : Philosophical Foundations*, ed. by Lawrence A. Alexander (Cambridge ; New York: Cambridge University Press, 1998), p. 251.

¹⁹ In the election of November 1932, the National Socialists (NSDAP) won 33.9% of the vote, and in the March 1933 election following the Reichstag fire and a campaign of terror against their opponents, they only managed to get 43.9% of the vote.

²⁰ J Douglas Smith, *On Democracy's Doorstep: The Inside Story of How The Supreme Court Brought "One Person, One Vote" to The United States*, (Hill and Wang, 2014), p. 17.

Schmitt, and a justice on the *Bundesverfassungsgericht* from 1983 to 1996. Böckenförde's concern was how the liberal democratic state could sustain itself in a secular age without the type of indoctrination of the citizenry which would make a mockery of the idea of 'liberal' democracy. Böckenförde's question was directed at essentially the same problem addressed in different ways by Jefferson, Tocqueville, and Arendt: how the bond between the emancipated citizen and the state could be maintained. While Jefferson's focus was on how the bond between citizens and state could be maintained through civic participation and increasing the presence of the state in the lives of the citizens, Böckenförde's concern—reflecting the modern difficulty of broad civic participation in large complex states—was about whether that same bond could be maintained in a secular age through liberal constitutional values alone. Böckenförde's critique was aimed at the objective value order of the Court which he would later sit on, a value system which he thought, firstly, sacrificed some "liberalness" in the interests of the "prescribed state ideology, the revival of the Aristotelian *polis* tradition", and secondly, might be insufficiently cohesive to bind Germans to, what remained in 1964, a fragile liberal democracy.²¹ Arendt's interpretation of Jefferson, Tocqueville's view on how despotism occurs, and, implicitly, Böckenförde's view on the bonds of social cohesion are all pointing, I contend, to the same general conclusion. That representative government, or the secular liberal state, as Böckenförde puts it, are at risk when citizens and the state become foreign to one another, either through a lack of participation in government or when the values and interpretations of each diverge.

The task, then, is how to ensure that participation occurs, and, in terms of what American or German constitutionalism permits, that it is participation that supports, and does not threaten, the constitutional order. As already stated, between the *legal / institutional space*—in which the reapportionment and electoral threshold cases take place—and the *civic space*, it is the latter that, I contend, is most crucial to the health and survival of the polity. This dichotomy sets up several conclusions related to the activity and success of each court in each of these two spaces. Firstly, though, I must establish some premises before stating the conclusions.

The focus of the legal case studies is on citizens who have been unconstitutionally excluded from the civic space either by local political majorities and

²¹ Böckenförde, pp. 45-46.

their representatives, or constitutionally excluded by the state in the interests of stability. The first scenario reflects the debasement of urban citizens' votes in the U.S. due to malapportionment, and the second, the German electoral threshold cases related to European Parliament elections where the votes of German citizens voting for parties garnering less than 5 percent of the vote are effectively nullified because the parties do not get a seat in parliament. Although the legal cases are argued in the legal / institutional space, the effects of the decisions have the potential to be felt in the civic space in terms of whether they improve electoral participation, the constitutional culture, the overall quality of the polity, and the relationship between the citizen and the state.

Beyond this question of how court decisions in the legal / institutional space affect the civic space is the broader and more central question of how American and German constitutionalism, and the U.S. Supreme Court and *Bundesverfassungsgericht* shape and influence the vital civic space that is integral to the democratic relationship between citizen and state, and, sometimes, the survival of the constitutional order itself. In other words, what is the judicial role in creating, maintaining or repairing the civic space within which opinions and values emerge in a liberal democracy? This idea raises multiple questions, not least whether the creation and maintenance of such a civic and political space *by judges* in the context of a liberal democracy is itself a non-sequitur? In other words, does a judicially created 'civic space' constitute a negation of liberalism itself? Germany is, following Böckenförde's critique, the most obvious example of such a judicially created *polis*.²² As I examine in Chapter 2, the very idea that the *BVerfG* can create a *polis* stems principally from the dignity oriented nature of German constitutionalism, the Court's objective value order, its wide ranging powers under the Basic Law, and its control over public and private law.

Exogenous rather than endogenous exclusion of voters is the subject of the legal cases, either through malapportionment by the U.S. states, or through electoral thresholds maintained by the sovereign state of Germany. Endogenous exclusion (or self-exclusion) of citizens due to their own apathy, lack of interest in politics or in participating in the civic space is a real issue in modern liberal democracies, as evidenced by a generally downward trend in voter turnouts at elections.²³ Although 'self-exclusion' is not considered directly in this thesis, it is indirectly through the lesser

²² See *supra* note 21.

²³ Richard Bellamy, *Citizenship: A Very Short Introduction*, (Oxford University Press, 2008), pp. 3-4.

or greater capacity of American and German constitutionalism to shape and influence the quality of the civic space in which citizens choose to engage (or not).

The legal cases and the effects of American and German constitutionalism in their respective civic spaces reveal some paradoxical conclusions, but ones which nevertheless follow from the liberty-dignity dichotomy. Through its decisions in the reapportionment cases, *Baker v Carr* and *Reynolds v Sims*, the Supreme Court was able in the legal / institutional space to successfully correct flaws in the political process to end malapportionment. This had a broadly positive effect on the civic space due to a rebalancing of political power from rural to urban areas. Moreover, the knowledge of urban and suburban voters that their votes were no longer being debased could only improve democratic participation. However, the effects of the reapportionment cases in the civic space were, I think, limited. The Court's inability to deal with the issue of gerrymandering, to bridge the differences between urban and rural areas, and to positively improve American democratic practices illustrates its limited reach in the civic space. By contrast, in the legal / institutional space, the *BVerfG's* interventions in the European Parliament electoral threshold cases have sometimes been methodologically suspect, counter-productive and, potentially a risk to stability at the EU level; but in the civic space, due to its objective value order, the respect for law in Germany, its powers in the Basic Law and through the positive effect on 'civics', from the constitutional complaint mechanism, the *BVerfG* has been much more successful than the Supreme Court at creating a strong democratic and constitutional culture.²⁴

The intervention by the Supreme Court in the reapportionment cases and its 'one person one vote' decision can be explained through a changed understanding of the idea of equality within American constitutionalism, and of the groups and persons to whom equality applies. This logic formed the basis of the reasoning of both the Court and the submissions of the Solicitor General's office²⁵ in the reapportionment cases, which highlighted the expanding suffrage and the significance that successive constitutional amendments implied.²⁶ However, this decision took place in the legal / institutional already mentioned; in other words, the courts. Malapportionment arose out of a breakdown in the civic space where local majorities held onto power unconstitutionally. While the Supreme Court could remedy the situation and compel every state legislature

²⁴ See *infra* note 218.

²⁵ See *infra* note 377.

²⁶ See *infra* note 455.

in the U.S. to reapportion, the value schism between urban and rural areas which caused malapportionment remained.

The Supreme Court's formalisation of this 'liberal' or 'equality' narrative of constitutional development concealed an increasing geographic and regional value schism between urban and rural areas, and northern and southern regions after the 1930s which reached its peak during the period of the Warren Court (1953 – 1969). This geographic value schism which became unmistakable from the 1960s onwards, is vividly represented in the campaign by civil society actors against malapportionment which is examined in Chapter 5. Malapportionment was ostensibly a power battle between state legislatures dominated by rural lawmakers representing a declining number of voters, and urban politicians and civil society actors demanding more equal numerical reapportionment between electoral districts. The conflict over malapportionment, however, also reflected a clash of interests and values. On one side, the wealthy rural areas supported by big business interests that were vehemently opposed to the social reforms ushered in by the New Deal. On the other, cities with under-represented and growing populations, where unionization created a political consensus demanding improved rights for employees.²⁷

While the important interventions in American representative democracy by the U.S. Supreme Court have been generally episodic to deal with specific issues like malapportionment, those of the *BVerfG* since the founding of the Federal Republic have been as constant as they have been significant. The German judicial involvement in representative democracy represents a paradox. It is characteristic of the militant democracy at the heart of the constitutional order since 1949, but this *streitbare Demokratie* also marks the maturation of Germany's liberal constitutionalism that was extinguished in 1849, and which was again snuffed out with the demise of the Weimar Republic. The Court's intervention in the European Parliament electoral threshold cases thus represents an attempt to balance fundamental goals which lie at the heart of Germany's constitution, the Basic Law (*Grundgesetz*): upholding the architectonic principles of human dignity and the free democratic basic order and preventing the constitutional order from committing democratic suicide, as happened to the Weimar Republic.

²⁷ Smith, pp. 4-5.

The title of Chapter 2 with its main focus on constitutionalism is ‘Taking Democracy Seriously’. This means recognising the importance of democratic participation as a means of governance and a mark of human dignity, but also being alert to its deficiencies and the capacity of individuals and groups with the most anti-democratic instincts to exploit those vulnerabilities. In Germany, this has meant a reliance on the *BVerfG* and the defence mechanisms of the militant democracy to maintain stability. The Court’s role as guardian of the Basic Law means that it must decide whether new political parties represent forces of renewal which can be safely integrated within the constitutional order as the Greens were in the 1980s, or whether they must be banned as the Socialist Reich Party (SRP) and German Communist Party (KPD) were in the 1950s.²⁸

Understanding how both countries have mediated this balance requires a focus on how the values of constitutionalism have developed through interpretation and social struggle in society, and the extent to which the citizens and groups in both countries identify with these values, or only with what Böckenförde calls “internal bonding forces”²⁹, such as religion or nation. The initial emancipation of the individual from the state which the ‘Declaration of the Rights of Man’ ushered in was initially short-lived as the rise of nationalism in the nineteenth century provided a means to reintegrate people into the state. However, the relative decline of the force of nation since 1945 raises the question of how representative democracy and liberal values can maintain the bond between citizen and state. Individualism too has increasingly alienated people from one another, leaving societal cohesion and the liberal democratic constitutional state reliant on those values of human dignity, equality and fundamental rights, reflected in the post-1945 human rights instruments and in the rulings of the Supreme Court from the late 1930s onwards.

The ‘international’ dimension is highlighted in Chapter 2 because of its relevance to two recurring ideas which will be referred to in the following chapters. First, is the question, unique to Germany, of whether the Federal Republic (FRG) after 1949 was simply a ‘fair weather’ democracy, blessed with economic growth and an international cold war context which provided stability but which disguised the absence of a supportive framework of liberal values or democratic inclination in German society? Second, is the question which, I contend, has implications for all liberal

²⁸ *Socialist Reich Party Case*, 2 BVerfGE 1 (1952); *Communist Party Case*, 5 BVerfGE (1956).

²⁹ Böckenförde, p. 46.

constitutional democracies, of whether the liberal democratic state, following Böckenförde, rests “on presuppositions that it cannot itself guarantee”³⁰. The fact that the values being promulgated in the Universal Declaration of Human Rights (UDHR) and European Convention on Human Rights (ECHR) also reflected the values of the Basic Law and other new constitutions after 1945 was cause for optimism, but also caution. Was the dialectic of rights and human dignity at the international level simply a veneer which disguised the basic fragility of liberal values *within* states?

1.2 Enquiry

The scholarly interest in democracy in the early years of the 21st century was palpable. Partly this was a response to the end of the Cold War and the burgeoning of democratic forces in eastern Europe. Democracy was, as one writer put it, “the only game in town.”³¹ This academic focus reflected the underlying reality that “there have been more governments that would be termed ‘democratic’ in place over the past two decades than at any point in human history.”³² Yet even as democracy appeared to enjoy a resurgence with the collapse of Soviet communism in Eastern Europe, concerns were raised about the illiberal nature of some of these emergent democracies.³³ Since World War Two *democracy* and *liberalism* had become almost interchangeable as labels for a government committed to upholding the civil, individual and political rights of its citizens.

The growing disjuncture between the two concepts in recent years caused by growing illiberalism—illustrated by the current anti-liberal trajectory of Hungary and Poland, and the ‘unknown unknowns’ of a Trump presidency—brings into sharp relief the role of the courts in maintaining rights when political channels either become corrupted or actively hostile to individual liberty and democracy itself. Ongoing threats to constitutionalism in Hungary and Poland from their ruling parties, countries where the roots of liberalism have been only recently planted, are a reminder of the challenge of entrenching liberal values against nationalist and other extremist forces. That Germany’s post-war constitution served as a model for these two countries³⁴ is a further

³⁰ Ibid. p. 45.

³¹ Kim Lane Scheppele, ‘Democracy by Judiciary (or Why Courts Can Sometimes be More Democratic Than Parliaments)’, *Rethinking the Rule of Law After Communism*, Central European University Press, New York, (2005), 1.

³² Samuel Issacharoff, ‘Constitutional Courts and Democratic Hedging’, *Geo. LJ*, 99, (2010), 965.

³³ See Fareed Zakaria, ‘The Rise of Illiberal Democracy’, *Foreign affairs*, 76, (1997).

³⁴ See *infra* note 127.

reason to assess whether the successful German model of constitutionalism as manifested in fundamental rights, restrictions on state power and a powerful constitutional court is still effective at preventing a country committing ‘democratic suicide’.

Even more than the question of the legitimacy of judicial review in the United States, which was the inspiration for Alexander Bickel’s so-called ‘Countermajoritarian Difficulty’³⁵, the judicial involvement in the processes of representative democracy raises important questions about the justification for such interventions, confidence in democratic processes, and the substantive values that a constitutional order stands for. Constitutionalism adds a further layer of complexity to these questions of democratic legitimacy by seeking to ensure that political processes are conducted in conformity with duly enacted law and are compatible with the higher law values that a constitutional order recognises through its courts. To what extent do fundamental values of human dignity and equality eclipse the right of democratic participation, or justify the courts intervening in rules governing democratic or electoral processes, even to protect minority groups? And if participating in the democratic process is itself an intrinsic mark of human dignity, under what circumstances may that right be restricted in the interests of either stability or the survival of the state?

The distinction between the focus on liberty in American constitutionalism and that on dignity in German constitutionalism is crucial to the relationship between democratic institutions and the citizens because of the comprehensive normative control that I argue the *BVerfG* has over both the *legal / institutional* (i.e. court) space and the *civic* space. The Supreme Court only has influence over the former, its own domain. This is due to a variety of factors including the liberty-dignity dichotomy, the *BVerfG*’s control over the entire German legal system (public and private law), and the German ‘constitutional complaint’ and ‘organ of state proceeding’ mechanisms. Whereas the U.S. Supreme Court’s role in American democracy is essentially corrective for when something goes badly wrong with the system (i.e. voter exclusion or voter disenfranchisement), that of the *BVerfG* has been far more comprehensive in shaping the relationship between citizen and state. Thus, the *Bundesverfassungsgericht* has been much more successful than the U.S. Supreme Court at establishing a strong liberal

³⁵ Alexander M. Bickel, *The Least Dangerous Branch : The Supreme Court at The Bar of Politics*, 2nd edn (New Haven ; London: Yale University Press, 1986).

democratic culture.³⁶ As will be addressed in later chapters, this is why the German court's influence over German democracy has been more significant and far reaching than that of the U.S. Supreme Court over American democracy.

Ultimately, what happens in the civic space is far more crucial to the maintenance of a healthy representative democracy, and the survival of the state itself than what happens in the legal / institutional space. Germany ostensibly has an advantage over the United States because of the way that German constitutionalism has been able to shape that civic space, and majority opinion, to create a mature liberal democracy. The advantage that American constitutionalism has had, at least up to 2016, is that the variations in majority sentiment in such a large country has meant that while the conditions of liberal democracy have not been nurtured as in Germany, the ability of majorities and minorities in the U.S. to live their lives within a broad tableau of constitutional meaning has prevented anything from going too badly wrong. This picture of constitutionalism in both countries is primarily rooted in the liberty-dignity dichotomy which will be elaborated upon more fully in Chapter 2.

A shift in the *BVerfG*'s jurisprudence can be observed from some aspects of the traditional 'militant democracy' stance of German constitutionalism to a greater focus on electoral equality between voters and equal opportunity between parties.³⁷ In these cases from 2011 and 2014, which will be examined in detail in Chapter 7, the Court made a controversial decision to strike down the 5 percent threshold for elections to the European Parliament.³⁸ The decisions were contentious because such electoral hurdles have been seen since 1949 as a tool to prevent legislative fragmentation as was seen during the Weimar Republic. The spectacle of a constitutional court taking steps to reduce voter inequality and widen the plurality of democratic choices available, against the wishes of, and to the consternation of, Germany's democratic legislature and government, is only one of the paradoxes that these cases raise.

The role of each Court in supporting groups and voters that have been excluded, constitutionally and unconstitutionally, from the political process is a key focus of this enquiry. In the U.S., the famous footnote four of the Supreme Court's decision in

³⁶ See *infra* note 218.

³⁷ See *infra* note 72.

³⁸ The 2014 decision struck down the 3 percent threshold that the *Bundestag* had passed in response to the 2011 decision.

*Carolene Products*³⁹ signalled a process of more searching judicial review where political processes had excluded minority groups from participation in the political process. In the U.S. malapportionment cases, this exclusion, through the debasement of voting strength, was manifestly unconstitutional as a consequence of the failure of many state legislatures to reapportion for almost sixty years. Since the *BVerfG*'s establishment in 1951 it has seen its role as giving support to the parliamentary opposition in discharging their responsibilities and, as already mentioned, in support of the integration of parties like the Greens. In the German electoral threshold cases related to European Parliament (EP) elections, the exclusion of voters and parties had been entirely constitutional as a result of the Federal Republic's intense focus on stability since 1949, but in its decisions of 2011 and 2014 the Court ruled that the thresholds (*Sperrklauseln*) could no longer be justified.

Key Definitions: Malapportionment and Gerrymandering

There are essentially two forms of malapportionment: *numerically* based, which is referred to as 'malapportionment' hereafter; the second is *geographically* based malapportionment, which is known as 'gerrymandering.' The main focus of Chapter 5 is on numerically based malapportionment which was the primary problem in the United States prior to the 1960s reapportionment cases including *Baker v Carr*⁴⁰. This form of malapportionment occurs when there are significant variations in the populations of legislative districts in a state, resulting in some legislators representing many more constituents than other lawmakers. Gerrymandering became even more common in the U.S. after numerically based malapportionment was declared unconstitutional by the Supreme Court. It is characterised by the attempt to gain electoral advantage for one party by the drawing of the boundaries of electoral districts to include certain preferred voters and exclude others voter groups.⁴¹

1.3 Methodology

Constitutionalism in its post-1776 American and post-1949 German manifestations was fundamentally built around institutions. Even if human virtue was absent or corrupted, what mattered was that the institutions held firm.⁴² Institutions

³⁹ *United States v Carolene Products Co. (No. 640)*, 304 U.S. 144 (1938).

⁴⁰ *Baker v Carr*, 396 U.S. 186 (1962). Malapportionment in Tennessee formed the crux of the case in *Baker* and involved population variances of up to 20-1 between rural and urban areas. Other states had even larger variances.

⁴¹ See *infra* note 485.

⁴² This was, as Waldron suggests, the argument of David Hume and James Madison that "we can set up

form the bedrock of the American and German experiments in constitutional government. Both sets of institutions were intended to control the more venal instincts in human nature, whether they emanated from the rulers or the people. Germany's institutions after 1949 had to cope with the continued dangers emanating from the 1932-1945 period,⁴³ as well as the dismal legacy of the Weimar Republic, and the failed liberal constitution of 1849.

Jeremy Waldron, for one, thinks institutions matter a great deal for political theorists, and for democracy.

We need institutions to frame the hard choices and decision-making that our disagreements give rise to. And we need to find ways of respecting one another in our politics in the environment that those institutions provide.⁴⁴

Moreover, institutions are not simply frameworks for argument, or restraints on a corrupt people or government; they can also help deliver positive goods. Even if principles such as justice, liberty, security and equality remain our main preoccupation, Waldron adds, we must understand the institutions, (or “mechanisms”), through which these ‘ideals’, as he calls them, are pursued.⁴⁵

Waldron's emphasis on the importance of institutions is one which I concur with. This thesis adopts an analytical-historical approach that assesses American and German constitutionalism through one or more of these three understandings of institutions: as a restraint on government and the people; as a framework for ongoing deliberation among people of different views; and as mechanism through which the state may attempt to advance certain values including justice, liberty, security and equality. However, institutions are not enough.

That is to say, while institutions are hugely important in American and German constitutionalism, they do not in themselves tell us what is happening in the civic space, or reveal the health of the relationship between a people and their constitutional government; nor do institutions sufficiently explain why some constitutions succeed and others fail. In the context of the central enquiry, a focus on institutions alone does not

institutional structures to produce good results whatever the state of individual virtue in the polity.”

Jeremy Waldron, *Political Theory: Essays on Institutions*, (Cambridge: MA: Harvard University Press, 2016), p. 6.

⁴³ See *infra* note 496.

⁴⁴ Waldron, p. 7.

⁴⁵ *Ibid.* p. 6.

explain the value systems, ways of life, forms of identity and “internal bonding forces”⁴⁶ in the civic space, and the ways in which they may reinforce or undermine the enunciation of constitutional values in the legal / institutional space. While an emphasis on institutions is important in constitutionalism, it is a dangerously incomplete picture if it leaves out of the equation the crucial civic space in which citizens participate in their democracy, or challenge it.

A number of other writers have also highlighted, implicitly or more clearly, the importance of democratic practice, political culture and civic society in supporting formal political institutions. In his study of 22 democracies that have remained steadily democratic since at least 1950, Robert Dahl noted that the key factors which seem to favour democratic stability include “effective control by elected leaders over the military and police, a political culture supportive of democratic beliefs, and a relatively well functioning economic order.”⁴⁷ If some conditions in a country are favourable to democracy while some are unfavourable, then Dahl argues that the particular features of constitutional institutions could tip the balance one way or the other, “toward democratic stability or democratic breakdown”.⁴⁸ Dahl’s study indicates that “no constitutional system can preserve democracy in a country where the other favourable conditions are absent.”⁴⁹ In other words, while institutions may sometimes tip the balance “where the underlying conditions make democracy rather chancy”⁵⁰, they are only part of the picture.

With Dahl’s somewhat bleak take duly noted, it would seem that constitutionalism will often have its work cut out in certain countries at certain times. Dahl’s emphasis on a “political culture supportive of democratic beliefs” highlights the need for an analytical approach that recognises the importance of both the civic space, and legal / institutional space. This is the analytical approach that will be adopted in the succeeding chapters. Though expressed slightly more enigmatically than Dahl, Sheldon Wolin points to an emphasis on the civic and cultural conditions that support constitutional democracy.

⁴⁶ Böckenförde, p. 46.

⁴⁷ Robert A Dahl, *How Democratic is The American Constitution?*, 2nd edn (New Haven, Conn. ; London: Yale University Press, 2003), p. 94.

⁴⁸ Ibid. pp. 95-96.

⁴⁹ Ibid. p. 95.

⁵⁰ Ibid.

Rites are cultural rather than legal artefacts. Their value lies in the responses that they evoke, and these depend upon the store of beliefs, memories, customs, and values in the society—all that makes up the political culture. A political culture sets standards of performance not only for its authorities and rulers but for its members.⁵¹

Wolin's division in the final sentence between the legal and the cultural space, between the performance of the authorities and of its members—the people, highlights a distinctive feature of the approach taken in this thesis: the division between the legal / institutional space in which the Supreme Court and *Bundesverfassungsgericht* interpret and shape constitutional meaning, and the civic space in which 'its members' accept, reject, and contest constitutional meaning, or even challenge the existing constitutional order.

The idea of performance in the above excerpt from Wolin highlights how the act of citizenship and of participating in a civic or legal / institutional space and upholding the polis may require one to don a certain garb or mask. One writer who addressed the need for a structure within which political conversations and participation could take place is Hannah Arendt. As Waldron notes, Arendt "invokes the imagery of construction outside the house: fences and boundary walls, which make politics possible by securing a space for the public realm."⁵² Waldron emphasises Arendt's idea of *isonomy*—the "capacity of positive laws to make people equal in the political realm, even if they are in other respects different and unequal".⁵³ This idea of law creating a common language within which citizens can relate to one another as equals is one I will come back to. Arendt's focus on the role of law in the act of citizenship or *persona* seems particularly relevant for both the United States and Germany, although in different ways. The role of law has been intrinsic to their institutional development and, to a greater or less degree, their national narrative.

The term 'civic space' that I use throughout the thesis refers to the place where citizens participate in politics and their democracy by voting, or where they uphold or contest the values of their society through discourse and argument. For a civic space to exist, I argue that it must be based on an "exchange of opinion between equals",⁵⁴ such

⁵¹ Sheldon S. Wolin, 'Tending and Intending a Constitution', in *The Presence of The Past : Essays on The State and The Constitution*, (Baltimore: Johns Hopkins University Press, 1989), p. 85.

⁵² Jeremy Waldron, 'The Constitutional Politics of Hannah Arendt', in *Political Political Theory: Essays on Institutions*, (Cambridge: MA: Harvard University Press, 2016), p. 293.

⁵³ Ibid. p. 299.

⁵⁴ See *supra* note 9.

as Arendt described the American founders as desiring. Law occupies an important place in the thesis that I have called the ‘legal / institutional space’, which is an important part of constitutionalism. It is primarily the courtroom, but also wherever the influence and value of law and the constitutional interpretations of the respective courts are accepted. Thus, the law may be, in Böckenfördean terms, an internal bonding force of civic and societal cohesion, or a common language within which citizens can regard one another as equals. Here, I see law as providing a framework and nomenclature which helps individuals see themselves as embodying and sharing certain values.

Although written about England in the 1940s, George Orwell’s description of constitutionalism and law as cultural and social artefacts, and a language of cohesion, is exactly how I see the potential for the legal / institutional space to extend into the civic space.

Here one comes upon an all-important English trait: the respect for constitutionalism and legality, the belief in ‘the law’ as something above the State and above the individual. [...] Everyone takes it for granted that the law, such as it is, will be respected, and feels a sense of outrage when it is not. Remarks like “They can’t run me in; I haven’t done anything wrong”, or “They can’t do that; it’s against the law”, are part of the atmosphere of England. [...] Everyone believes in his heart that the law can be, ought to be, and, on the whole, will be impartially administered. The totalitarian idea that there is no such thing as law, there is only power, has never taken root.⁵⁵

Without acceptance of this sense of law and constitutionalism in the civic space, the influence of the Supreme Court and the *Bundesverfassungsgericht* becomes purely institutional and effectively consigned to the courtroom. Their decisions still have the force of law and must be obeyed, but the courts’ potential to improve the processes and values of democratic politics and support the relationship between citizen and state is greatly reduced.

The health of the civic space and the relationship between citizen and state would seem to rest, then, on one or more of the following: civic and associational activities in Tocquevillean and Jeffersonian terms; Böckenförde’s internal bonding forces such as religion, nation, and, perhaps, Orwell’s cultural artefact view of law and constitutionalism above; or the sheer vibrancy of political life and its participatory

⁵⁵ George Orwell and P. H. Davison, *The Complete Works of George Orwell: Volume 12 / Edited by Peter Davison*, (London : Secker & Warburg, 1986-98., 1986), p. 397.

potential. With respect to the latter, generally poor voter turnout in elections across Western democracies suggest all is not well in this department, although Germany seems in a rather better position.⁵⁶

The thesis approach adopted does not make any normative judgments as to whether the language of law is more potent or important than the language of politics. It assumes, though, that an understanding of the rule of law in society as a whole can only strengthen a democratic politics based on equal respect. One current problem in the U.S. is that there no longer seems to be any civic (or civil) language that is currently able to fill the gap that the decline of civic, religious, and associational activity has left. Richard Bellamy's argument that democracy "embodies and upholds" the values of "constitutionalism, rights [and] the rule of law" provides an important framework for conceptualising what I see as a key question which orients the distinction between America's 'liberty' oriented constitutionalism, and Germany's 'dignity' infused model.⁵⁷ This is the question of whether democratic ideas and practice provide the conditions for rights and the rule of law to emerge, or the reverse: whether fundamental rights and the rule of law are the *sine qua non* for the emergence of liberal democracy? The latter view is embodied in the principles and practice of German constitutionalism since 1949.

In Germany's case, some of the roots of this understanding lie in the Kant infused development of the *Rechtsstaat* in the early nineteenth century. The translations 'rule of law' state or the 'law governed state' do not quite do justice to the original idea of the *Rechtsstaat* as a "state governed by the law of reason" which

insisted on the freedom, equality, and autonomy of each individual within the framework of a unified legal order defined by legislation and administered by independent courts of law.⁵⁸

As will be addressed in Chapters 6 and 7, after 1949, this older focus on the *Rechtsstaat* was fused with a set of constitutional values derived from "the dialectic between [...] liberal, socialist, and Christian natural-law traditions"⁵⁹. Moreover, the older emphasis on law and natural rights as a precondition for democracy found fertile ground in the

⁵⁶ U.S. turnout in the 2016 election was 58%. In Germany in the *Bundestag* election of 2013, it was 71.5%. By way of comparison, voter turnout in the U.K. rose from a low of 59% in 2001 to 66.1% in 2015.

⁵⁷ See Bellamy, *Political Constitutionalism: A Republican Defence of The Constitutionality of Democracy*, p. 260.

⁵⁸ Donald P Kommers and Russell A Miller, *The Constitutional Jurisprudence of The Federal Republic of Germany* 3rd edn (Durham [N.C.]: Duke University Press, 2012), p. 48.

⁵⁹ *Ibid.* p. 70.

widely held German cultural view that politics was “a dirty business” and law a “clean one”⁶⁰.

In the U.S. by contrast, the free space that the constitutionalism of liberty initially provided opened up boundless possibilities for the development of various forms of self-government and various value systems, including less savoury ones like slavery. The fencing off of government which created this zone of liberty created a profound divergence between what Wolin saw as the “sophisticated theory of a Constitution” as represented by *The Federalist Papers*, and the “flourishing political cultures and practices” as represented by the colonial and revolutionary history of the several states.⁶¹

What I am interested in examining are the modern heirs, or consequences, of this divide between theory and practice for the relationship between citizen and state, and the possibility of liberal representative democracy. This divergence between theory and practice influences, without determining, the separation between the legal / institutional space and the civic space. Regardless of their different national histories, the strength of the relationship between citizen and state in the U.S. and Germany seems much more determined by the health of the civic space. However, the potential and possibility of law shaping or improving the processes and values of that civic space is one that I believe is important as this analysis proceeds. This does not have to mean the domination of the civic space by the legal / institutional one. It merely means preserving within the civic space an understanding of the values of constitutionalism and law as being the antithesis of pure power, in the sense Orwell captured so well.

There is, though, an important difference between the U.S. and Germany which takes us back to Waldron’s point about how institutions can be a means to pursue certain “ideals”. American constitutional institutions were fundamentally conditioned by the idea of restraining the state—what I call ‘liberty’ constitutionalism—and thus leaving a zone of freedom for the citizen. By contrast, the highly normative ‘dignity’ constitutionalism of Germany’s Basic Law and its institutions sought to establish a relationship between the individual and their community based on “a person’s dependence on and commitment to the community, without infringing upon a person’s

⁶⁰ Bernhard Schlink, 'German Constitutional Culture in Transition', in *Constitutionalism, Identity, Difference, and Legitimacy : Theoretical Perspectives*, ed. by Michel Rosenfeld (Durham, NC: Duke University Press, 1994), pp. 210-11. See *infra* note 592.

⁶¹ Sheldon S. Wolin, *The Presence of The Past : Essays on The State and The Constitution*, (Baltimore: Johns Hopkins University Press, 1989), pp. 86-87.

individual value”⁶² In other words, while American constitutionalism sought to fence off the institutional space (i.e. government) from the civic space, German constitutionalism has sought to reunite them. This understanding shapes the context within which judicial interventions in representative democracy occur, the extent to which the respective ‘constitutionalisms’ are able to influence the civic space, and dictates the methodological approach that is adopted.

1.3.1 Theoretical and Methodological Approach Adopted

The thesis will examine why judicial interventions in the institutional processes of representative democracy occur, and more broadly the extent to which American and German constitutionalism have influenced, positively or negatively, the quality of constitutional democracy and the relationship between citizen and state. The thesis predominantly adopts an analytical rather than normative approach, focussing on how constitutional systems can unblock political channels which have become ossified through the constitutional or unconstitutional exclusion of voters and the parties they support; these excluded voters may support either existing or emerging political forces. This enquiry assesses legal cases and the role of the U.S. Supreme Court and *Bundesverfassungsgericht* as tools for the application of constitutionalism in their respective political systems and societies. The reason for the analytical and historical approach is that the relationship between citizen and state in the U.S., Germany, and other countries, has been shaped by the same impulses arising out of, firstly, the emancipation of the citizen after the French Revolution, and, secondly, the social cohesion problem of how the state reintegrates the emancipated citizen back into society.⁶³ This analytical approach is not, however, undertaken from a purely legal perspective, rather it is focussed squarely on examining the intersection between politics, law, history, and theory, and how this intersection plays out both in a legal / institutional and civic space.

Of particular interest within this analytical approach is the idea of constitutionalism as a process of historical development within which emancipatory advances take place. As Stanley Katz puts it, “true constitutionalism [...] is the product of political struggle within particular societies, not a set of universal values or prescribable institutions.”⁶⁴ Constitutionalism is a legal and a political idea; both will be

⁶² *Investment Aid I Case*, 4 BVerfGE 7 (1954).

⁶³ See for example, Böckenförde, p. 44.

⁶⁴ Stanley Katz, 'Who's Afraid of Senator Byrd? The Constitution and the Uses of American History', in

brought forth in the chapters ahead. However, it does so by way of an analysis based on political theory, but which also examines the historical context within which American and German constitutionalism and each of these important courts have developed. Overall, the analysis seeks to tease out how a changing emphasis on stability or renewal within American or German constitutionalism can affect interactions between the respective courts and litigants in cases, and more broadly how constitutional values can be reinforced or undermined by more traditional value systems and forms of identity in the civic space and society.

Although the methodological approach adopted is predominantly analytical and historical, there are some potential ‘normative’ difficulties that must be clarified and overcome. In arguing that the strength of the relationship between citizen and state also depends on whether each court can influence the civic space and inculcate the values of the respective constitutional orders in the political culture, some judgments must inevitably be made in terms of whether the influence of these prominent courts has been positive or negative. Ostensibly, such an evaluation might appear to be normative if it was based on some notion of ‘the good’. Stephen Elkin argues that “political institutions are educative and thus have an ethical dimension.”⁶⁵ While such an ethical evaluation of institutions is not germane to the present enquiry, this nevertheless highlights the question of whether the legal / institutional space and the civic space have a normative function or disposition that is intrinsic to them? The clear argument offered here is that they do not. While institutions may be designed to better achieve certain normative values as, indeed, those established by Germany’s Basic Law were, the value orientation of institutions is, I contend, principally based on the actions of those operating within them. If the institutions of the state are rotten it is predominantly because the values of the people inside them are rotten.⁶⁶

Institutions such as the malapportioned state legislatures or those of the Nazi state have the potential to exert a negative influence on the values of the civic space. Equally, the possibility also exists for the civic space to influence the political and legal

Constitution Day Lecture, Woodrow Wilson School, (Princeton University, 2007).

⁶⁵ Stephen L. Elkin, ‘Constitutionalism’s Successor’, in *A New Constitutionalism : Designing Political Institutions For A Good Society*, ed. by Stephen L. Elkin and Karol Edward Soltan (Chicago ; London: University of Chicago Press, 1993), p. 118.

⁶⁶ This does not discount the pertinence of political science and international relations accounts of institutions; see for example, Daron Acemoglu and James A. Robinson, *Why Nations Fail : The Origins of Power, Prosperity and Poverty*, (London: Profile, 2012). Indeed, as I make clear in Chapter 6, the institutions of the post-war Federal Republic were structured to realise the idea of the militant democracy and to further the liberal democratic values of the constitutional order.

institutions of the state positively or negatively, dependent on the values of the citizens within the civic space.⁶⁷ It may not be possible to escape entirely from the normative implications of this chicken/egg scenario, yet the intrinsic normativity in constitutionalism offers a possible solution.⁶⁸ One test of the influence of the legal / institutional space in the civic space is certainly the degree of acceptance in the civic space of the values of constitutionalism as enunciated by the respective courts. However, common to American and German constitutionalism, and to the decisions in each of the case studies, as I will outline, is the importance of equality, the acceptance or rejection of which in the civic space represents another important test of the influence of the legal / institutional space in the civic space, and of the overall health of the polity.

One reason, it is suggested, that the Supreme Court has not been able to positively influence all of the multiple civic spaces in a continent sized country such as the U.S. is the liberty-centric nature of American constitutionalism with its hyper-individualism and its deep ambivalence towards government. Thus, the predominant value orientation operating within a given American civic space at any time is likely to be determined as much, if not more, by the value orientations of those citizens and civil society actors who are active in that civic space. As I will illustrate in Chapter 5, it was the activities and values of civil society actors such as the League of Women Voters in the United States that reached across from the civic space into the legal / institutional space and precipitated the litigation that resulted in malapportionment being declared unconstitutional. A further aspect of the analysis in Chapter 7 involves assessing the decisions of the *BVerfG* in the European Parliament (EP) electoral threshold cases against the stability oriented account of German constitutionalism that I have set out earlier in the thesis, particularly in Chapter 6. Such an assessment inevitably involves an evaluative judgment of those EP decisions, particularly given the normative nature⁶⁹ of German constitutionalism. Ultimately, I suggest that the *BVerfG*'s normative exuberance in advancing one value in the Basic Law, equality, is in tension with the Court's prior emphasis on stability.

⁶⁷ See for example Gitta Sereny's view on this question in the context of post-war Germany. See *infra* note 168 and text.

⁶⁸ The intrinsic normativity of constitutionalism might, of course, be contested. Interestingly, Somek argues that "the actual normative force of the constitution—that is, normativity that is not merely an empty ought—depends on factors that are not constituted by the constitution as a legal instrument. Such factors are, for example, the strength of popular support for a president, the party system, or the respectability of the judiciary." Alexander Somek, *The Cosmopolitan Constitution*, (New York: Oxford University Press, 2014), p. 4.

⁶⁹ See for example Kommers and Miller, p. 45. See also *infra* note 523 and text.

Constitutionalism depends on the right balance between liberal and republican ideas to be effective. A purely liberal approach which focused on rights and which attempted to restrain state power through only legal approaches could run the risk of stagnating as the people become reliant on courts rather than political channels to maintain their democratic rights. As will be illustrated in Chapter 7, the ability of citizens to file complaints with the *BVerfG* has been seen over 130,000 people file complaints since the Court's establishment in 1951. While the process, and the knowledge that it is available, has undoubtedly contributed to Germans becoming good constitutional democrats, there are dangers as well. A constitutional situation where citizens increasingly turn to the courts to resolve their economic or political problems is replete with problems, particularly the danger of lethargy among the citizenry in being awake to threats to liberal democracy that might emerge through political channels, as happened in 1930s Germany. Thus, as part of the analytical approach adopted one of the questions asked in Chapter 7 is whether the central role of the *BVerfG* in Germany represents a risk to the country's democracy or its surest foundation? Yet we must also recognise that a republican approach dependent entirely on a stagnating political system, perhaps characterised by gridlock and a weak centre-ground as seen in U.S. politics over the last twenty years may contribute to the sort of apathy or anger among voters which appeared to explain the result of the 2016 presidential election. Thus, either an over reliance on the courts or the failure of normal politics to address voter concerns increases the likelihood that citizens may vote for more extreme parties or candidates to deal with their problems if normal democratic channels have ossified.

In its focus on the intersection between politics, law, history and the civic space within constitutionalism, the thesis seeks to assess whether specific court decisions serve to reinforce or undermine 1) the relationship between the liberal democratic state and its citizens, 2) the processes and principles of liberal constitutional democracy, and 3) the country's underlying constitutional culture. Such decisions may promote stability or renewal, or sometimes both. Ensuring the participation of new political parties and excluded⁷⁰ voters may function to renew the political landscape and aid stability by ensuring that tensions and pressures arising from political exclusion are reduced. However, as will be addressed in Chapter 7, allowing some voters and parties to participate in the political system may cause instability and a breakdown in democratic processes if legislative fragmentation prevents a parliamentary majority from being able

⁷⁰ i.e. exogenously excluded by local political forces, or the state.

to form, as during the Weimar Republic. The important emphasis on ‘constitutionalism’ and ‘liberal democracy’ in this evaluation reflects the stability-renewal dichotomy which must also be considered both in the civic and legal / institutional space. A court decision reinforcing the relationship between citizens and their state, and improving democratic participation which leads to the rise of an illiberal democracy⁷¹ and then the collapse of constitutional government would, clearly, involve too much renewal and not enough stability.

The three part assessment above cannot be made, however, purely on the basis of the judicial interventions in the U.S. reapportionment cases or the German electoral threshold cases. It must also take into consideration the particular characteristics of American and German constitutionalism. This would include the historical development of constitutionalism, how particular decisions such as reapportionment fit into a larger narrative of court decisions, and indeed the larger narrative of the Court’s history including its role in the political system, and how its actions, and the law itself, are viewed by political actors and citizens.

The emphasis in this thesis is overwhelmingly on the domestic historic development of constitutionalism and democracy in each country. The interventions by the judiciary in Germany and the United States in their democratic processes have invariably involved the enunciation of important constitutional principles such as equality, human dignity and justice, which have primarily emerged out of each country’s own political and historic development. Thus, in the U.S. long unfulfilled principles of equality promised from the founding period to the Fourteenth Amendment were slowly realized by the Supreme Court in law in response to social struggles.⁷² Thus, I argue the fundamental importance of historical development within constitutionalism cannot be neglected, particularly if we are to see how constitutional understandings of equal protection and judicial methods of constitutional interpretation have evolved.

In Germany, the fundamental respect for law in German society, the principle of the *Rechtsstaat* from the early nineteenth century, and the unfulfilled liberal principles of the country’s 1849 constitution, which militarism had crushed, for almost a century, contributed to the strong resurgence of constitutionalism after 1949. Additionally, and

⁷¹ See *supra* note 33.

⁷² See for example *Baker v Carr*; *Reynolds v Sims* 377 U.S. 533 (1964); *European Parliament II Case 2 BVC 4/10* (2011); *European Parliament III Case 2 BvE 2/13* (2014); *Caroline Products*.

to a far greater extent than the U.S.— the values of German constitutionalism were influenced by comparable principles emerging from the post-1945 rights instruments and regimes, particularly the European Convention on Human Rights (ECHR). The founders of the Federal Republic who established the Basic Law in 1949 were especially concerned with binding the country to international institutions. This was partly because they shared the values of these instruments and wished Germany to rejoin the community of nations, sentiment that is expressed in the Basic Law’s preamble.⁷³ However, a secondary motive behind binding Germany to the Western alliance, the ECHR and the emerging European community was also to reinforce the country’s fragile democratic institutions.⁷⁴

My analysis of the German Constitutional Court has intentionally relied on criticisms made within Germany, since to anyone outside Germany, the placing of so much trust in a court might seem problematic. However, the Court has undoubtedly worked for Germany. While the Court itself is *sui generis* in terms of its power over the German political system, the flaws in constitutional democracy that it was created to counter have existed from classical times to the present day. Although at no point in human history have those flaws been as badly exposed and with such an ultimately heavy human cost as in the Weimar Republic.

1.3.2 Case Selection

Issacharoff notes that there is “a recurring pattern through which courts in many different constitutional regimes have had to confront surprising similar issues, regardless of the precise constitutional regime at play.”⁷⁵ While rejecting any claim of universal applicability, important lessons can be drawn from the United States and Germany given that both countries’ constitutions have acted as models for constitution formation in scores of states around the world.⁷⁶

The constitutional legal cases looked at in the U.S. and Germany both illustrate the involvement of civil society groups and citizens in attempting to ensure their voting rights and constitutions were upheld. The political campaign against malapportionment in the U.S., which initially went nowhere due to the intransigence and vested interests of

⁷³ “Conscious of their responsibility before God and man, Inspired by the determination to promote world peace as an equal partner in a united Europe, the German people, in the exercise of their constituent power, have adopted this Basic Law.”

⁷⁴ See *infra* note 158 (Moravcsik).

⁷⁵ Issacharoff, 'Constitutional Courts and Democratic Hedging'.

⁷⁶ See *infra* note 126.

lawmakers, eventually became a legal struggle in the federal courts. In Germany, it was the constitutional complaint mechanism which provided the means for citizens and political parties in the two European Parliament cases to petition the *BVerfG*.

The cases studies will be drawn from the period during which the courts have existed in parallel: from 1951 when the *Bundesverfassungsgericht* was established to the present day. Although the case studies will be drawn from this period, the analysis of the development of American and German constitutionalism will cover the period from the late eighteenth century to today. The focus on the period beginning in 1951 is not merely for reasons of temporal convenience. As Lietzmann notes, “the orientation of judicial activities on topics such as freedom of speech and assembly, the dignity of men and women, and the putative values of the constitution, in short, the manifestation of the traditional civil-democratic rhetoric, is formative for both courts.”⁷⁷

The cases that I will look at are instances where the courts have responded to a demand for relief from civil society actors, political actors and individual voters. In *Baker v Carr* and the other reapportionment cases, legal action was preceded by many years of demands from civil society, and from the executive branch, for action from state legislatures to end the malapportionment. No actions were forthcoming since legislators elected by a minority of the population were hardly likely to reapportion themselves out of employment. In the German cases, a challenge was made to the five percent threshold for electoral success for EU elections which came through a combination of constitutional complaints from German citizens (*Verfassungsbeschwerden*) and complaints made by organs of the state (*Organstreitverfahren*). These cases, which were brought by individual voters and smaller political parties, provide a useful illustration of the Court’s influence over the German political system, but equally highlight the central themes of the thesis: of voter exclusion (unconstitutionally or constitutionally), and how constitutionalism mitigates the dangers to the system of either too much of the wrong participation or not enough of the right kind.

1.3.3 Structure

From here, then, the thesis will proceed as follows. In Chapter 2, I will begin by establishing some parameters for understanding American and German

⁷⁷ Hans Lietzmann, 'Constitutional Courts in Changing Political Systems', in *Constitutional Courts in Comparison: The US Supreme Court and The German Federal Constitutional Court*, ed. by Ralf Rogowski and Thomas Gawron (New York: Berghahn Books, 2002), p. 94.

constitutionalism as being broadly rooted in the principles of liberty and dignity, respectively. The development of a predominantly normative constitutionalism after 1945 grounded in human rights norms and the individual in law will be considered, particularly with respect to Germany where the international context was more keenly felt than the U.S. However, while post-1945 constitutionalism reinforced the idea of the rise of the individual, it also contributed to a further weakening of the homogenising bonds between citizen and state which are an important part of this enquiry.

The question of civil association, civic participation and the values of the civic space will be considered in Chapter 3. How resilient are constitutional values such as human dignity in comparison to traditional values or forms of identity? Do political activities and more traditional forms of association and identity in the civic space serve to reinforce or undermine constitutional values and the relationship between citizens and their state? With reference to the writing of Tocqueville, Böckenförde, and Arendt's interpretation of Jefferson, the chapter addresses whether liberal constitutional values such as human dignity and fundamental rights are sufficiently cohesive to hold a society together and create a bond between citizens and their state without traditional forms of identity or "internal bonding forces" which can supplement and strengthen constitutional values (or at least not undermine them). Such differences in interpretation between institutions and civil society are unproblematic provided the local majorities still obey the Supreme Court's interpretation. The problem for a state is when its values and interpretations are challenged by its entire population, as during the Weimar Republic.

After Chapter 3's focus on values in the civic space, Chapter 4 considers the legal / institutional context within which constitutional values have been interpreted by the Supreme Court. The chapter then assesses the problematic concept of majoritarianism in a country like the United States with various different local and regional majorities, the views of which can, as the Civil War and segregation illustrate, often differ from national majority opinion. Madison's and Jefferson's fears about the threats arising from 'local majorities' in state legislatures illustrated the divide in the United States between constitutional value systems and those which threatened the rule of law.⁷⁸ Ultimately, it is the very flexibility in the Constitution which provides for the possibility of renewal, but which can also prompt such intense arguments over

⁷⁸ See *infra* note 270.

constitutional meaning. Through an assessment of the Court's complex relationship with national majoritarian politics we can observe its shifting jurisprudence in incorporating the Bill of Rights, and better understand the significance of *Carolene Products* footnote four in protecting political processes and minority groups. The effect was a seismic change between the late 1930s and 1960s in the idea of equality and an expansion of the groups and individuals to whom it applied.

In Chapter 5, I address the reapportionment cases that Chief Justice Earl Warren regarded as the most important during his time on the Supreme Court. It was the concerted political action of civil society actors for two decades in the civic space which was instrumental in getting *Baker v Carr* heard in the federal courts. However, the legal / institutional space of the Supreme Court became the only place in which a remedy to malapportionment could be secured. In its reapportionment decisions the Court fulfilled the principles embodied in footnote four of *Carolene Products*⁷⁹, and by doing so unblocked the stoppages in the democratic process that Ely saw as the Court's main purpose.⁸⁰ As significant as the decisions were at the time, and remain in hindsight, they were, though, unable to correct the fundamental value differences between urban and rural areas in the civic space which caused malapportionment. Within a couple of decades, the gains of the decisions were partially eroded by the continuing problem of gerrymandering.

The successful emergence of German constitutionalism and the country's representative democracy depended greatly on the high regard for law within German society. This deep respect for law boosted the standing of the *BVerfG*, allowing it to consolidate its position as guardian of the Basic Law and German democracy. Chapter 6 will assess the theoretical, historical and jurisprudential supports for stability and renewal within the Basic Law, with a particular focus on how the 'value of law' was important in establishing the *BVerfG*'s legitimacy in 1951. This was at a time when Germans had little faith in political institutions even as the country's new constitutional institutions had equally little faith in the democratic inclination of the German people.

Chapter 7 assesses the relationship between German representative democracy and the German people as it is shaped by the *BVerfG*. I will assess how the Court has involved itself in Germany's political and electoral processes, often on behalf of

⁷⁹ *Carolene Products*.

⁸⁰ John Hart Ely, *Democracy and Distrust : A Theory of Judicial Review*, (Cambridge: Harvard University Press, 1980), p. 117.

opposition groups and smaller political parties. In the European Parliament electoral threshold cases, the court controversially struck down the long-standing 5 percent threshold that parties have to clear to gain a seat. Overall, the chapter takes a more critical look at the role of the *BVerfG* in its interventions in these cases, even as the Court's standing and respect among the German people remains unequalled by any other institution in the German state.

Chapter 2 - Taking Democracy Seriously

What has changed since the Second World War is the acceptance that there is an overriding body of legal principle which limits the powers of the sovereign state; and that, in the German perspective, is very fundamental precisely because they saw what could be done with an unscrupulous government, using conventional legislative methods. So the idea of an overriding and encircling body of "law" is something which has developed and constitutionalism is part of it.⁸¹ (Judge David Edward)

It ought not to be regarded as slavery to live according to the constitution, but rather as self-preservation. (Aristotle)

⁸¹ Interview with former European Court of Justice Judge, Sir David Edward. October 2013.

In this chapter the degree to which a polity tolerates the emergence of certain values and opinions in the formation of majority rule will be considered in terms of the differences between American ‘liberty’ oriented constitutionalism and German ‘dignity’ oriented constitutionalism. As will be addressed, this distinction shapes how in the United States, most values and opinions are able to form, while in Germany there are absolute checks on whether opinions and values hostile to the constitutional order may emerge. One consequence of the liberty-dignity dynamic is that while the U.S. Supreme Court has tended to formalise emerging majority opinion on issues like segregation and reapportionment, the *Bundesverfassungsgericht*’s role as the guardian of Germany’s highly normative constitution has been more pedagogic in inculcating the values of the Basic Law in the civic, political and institutional space.

The chapter then assesses how the stability renewal paradigm at the heart of this enquiry shapes how German constitutionalism has had to balance threats to the state, the integration of new political parties into the political system and whether to maintain aspects of the militant democracy such as the thresholds for electoral success discussed in later chapters. A fine line exists between stability and ossification which the *BVerfG* has sought, not always successfully, to mediate. American constitutionalism has also come to recognise equality and human dignity in important court rulings.⁸² Unlike in Germany, though, where rights are seen as anterior to the state and a precondition of democracy, in the U.S. the emergence of these constitutional values has been largely the result of the free development of democratic principles in civic society and the parallel expansion of the suffrage and democratisation of political institutions.

The chapter then briefly assesses what I term ‘post-1945 constitutionalism’, including the establishment of international human rights instruments and a clear view of the centrality of the individual in law. This post-war period was characterised by the establishment of constitutional courts in Germany, Italy, and then later in Spain, which signified an effort to re-establish constitutionalism in countries where legislatures and legal positivism had conspired to undermine human rights. Yet the dialectic of human rights at the international level also had consequences in terms of growing individualism within liberal democratic states, challenging their ability to maintain

⁸² *Brown v Board of Education of Topeka*, 347 U.S. 483 (1954); *Baker v Carr*; *Reynolds*.

societal cohesion and uphold their constitutional values.⁸³ The important role of constitutionalism in shaping those domestic values is considered now.

2.1 Constitutionalism

Martin Loughlin writes that “constitutionalism involves the attempt to subject all governmental action within a designated field to the structures, processes, principles, and values of a ‘constitution’.”⁸⁴ According to McIlwain, constitutionalism “in all its successive phases” from ancient Greece onwards has “one essential quality: it is a legal limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law.”⁸⁵ According to Walter Murphy, “constitutionalism [...] enshrines respect for human worth and dignity as its central principle. To protect that value, citizens must have a right to political participation, and their government must be hedged in by substantive limits on what it can do, even when perfectly mirroring the popular will.”⁸⁶ Parts of McIlwain’s seminal account from the late 1930s are tinged with his obvious awareness of the threat that constitutionalism was facing from European totalitarianism⁸⁷. The definition advanced by Murphy has incorporated the notion of protecting fundamental rights, human worth, and dignity, which reflects the new human rights priorities in constitutionalism which arose after 1945.

Where constitutionalism ought to come into its own is when the values of the constitutional order (i.e. justice, equality, liberty, human dignity) are challenged by individuals or groups in society; or, more seriously, when voters elect representatives to power who are indifferent to its values or actively hostile to them as the Nazis were to those of the Weimar Republic. This view of constitutionalism is that it provides a safety mechanism to prevent democracy becoming a conduit for the infringement of rights as was the case during the National Socialist period in Germany. In other words, this view sees constitutionalism as mainly a limitation on government. While restraint is certainly an important aspect of constitutionalism, particularly, as we will shortly see, in the

⁸³ Böckenförde, p. 45.

⁸⁴ Martin Loughlin, 'What is Constitutionalism?', in *The Twilight of Constitutionalism?*, ed. by Petra Dobner and Martin Loughlin (Oxford: OUP Oxford, 2012), p. 47.

⁸⁵ McIlwain Charles Howard McIlwain, *Constitutionalism : Ancient and Modern*, (Indianapolis, Ind. : Amagi/Liberty Fund, [2007]. 1940).p.21.

⁸⁶ Murphy, W.F. “Constitutions, Constitutionalism and Democracy” in Walter F. Murphy, 'Constitutions, Constitutionalism and Democracy', in *Constitutionalism and Democracy : Transitions in The Contemporary World : The American Council of Learned Societies Comparative Constitutionalism Papers*, ed. by Douglas Greenberg (New York : Oxford University Press, 1993., 1993). p. 6.

⁸⁷ See *infra* note 755.

American context, constitutionalism can also have some positive content in terms of specifying the substantive ideals of a polity and the overall context within which the relationship between citizen and state is shaped. German constitutionalism reflects both conceptions of constitutionalism, as a limiting and empowering mechanism.

Alexander Somek argues that the “reasonable recognition concerning the supreme value and authority of human dignity and human rights” which emerges after 1945—what he calls ‘Constitutionalism 2.0’—and which is embodied in the constitutional practice of Germany’s Basic Law, helps us understand constitutionalism as a “project of emancipation”.⁸⁸ The assumption of many after the Second World War was that constitutionalism had secured, à la Fukuyama, the permanent ascendancy of liberal values with no possibility of a return to the barbarity of the past. But as Somek observes, “no emancipation is possible without political action”⁸⁹.

The portrait of democracy and the possibility of constitutionalism offered in this chapter and in the chapters ahead is a guarded one, reflecting the inherent challenge of building institutions which, to paraphrase Friedrich, can preserve human dignity while controlling the worst aspects of human nature.⁹⁰ However, the view that democracy *should* be taken seriously in no way suggests that there is any preferable form of government on the horizon to representative democracy. Taking democracy seriously means recognising its flaws and drawbacks as well as its obvious merits. It means recognising that in the U.S. reapportionment cases examined in Chapter 5, it was the concerted political action of civil society actors over almost two decades that raised the profile of the issue, and managed to get the Supreme Court to accept the justiciability of the issue. In Germany, it was political action that propelled the German Green Party from a pressure group to a political party represented in the German Parliament in the 1980s, and eventually into government as junior coalition partners of the Social Democrats (SPD), with its leader Joschka Fischer becoming foreign minister and vice-chancellor of Germany.

While the experience of the classical world, of Germany in the 1930s, and the increasing prevalence of illiberal democracies since the end of the Cold War are salutary warnings of where democracy *can* lead, the correlation between democracy on the one hand, and liberal constitutionalism and the rule of law on the other has been

⁸⁸ Somek, p. 9.

⁸⁹ Ibid. p. 283.

⁹⁰ See *supra* note 3.

more constant in the twentieth century than that between democracy and illiberalism.⁹¹ What this correlation does not automatically reveal is whether it is the emphasis on rights based constitutionalism, and strong political and legal institutions which leads to a vibrant democratic society, or whether democracy is the key to stable constitutionalism. What the historical evidence suggests, as Koopmans observes, is that democracy and the rule of law go hand in hand, and “where one of the two disappears, the other is in danger of being abandoned.”⁹² The reason, writes Koopmans is probably that

majority rule, in the democratic sense of the word, implies that different political opinions can compete for the voters’ favour. Every opinion must have a chance to become more generally accepted, so that the minority of today can be the majority of tomorrow. Freedom of expression and protection of minority feelings are part of the prerequisites of democratic government.⁹³

Not stated until the final sentence are the ends that democratic government seeks. In other words, which *values* or social goods does the polity seek to advance and protect (i.e. freedom of expression, the rights of minority groups, equality, liberty, human dignity, justice). The values that a polity stands for can be as crucial in determining the orientation of a constitutional order, and its relationship to individuals and groups in society as the institutional mechanisms which advance those values. Koopmans’ statement encapsulates the dilemma of how a liberal constitutional democracy establishes the institutional and societal conditions to sustain itself over time, and why some fail.

Within constitutionalism, then, we can say that values can be both the essential currency and framework within which the opinions and interests above shift from being a minority to a majority view, and back again. In other words, this is about debate, contestation and, sometimes, conflict between different interests and groups in society. Values inform and orient these debates but are inevitably shaped by them as well. One example would be how segregation increasingly became unacceptable in the United States during the 1940s and 1950s; another would be how gay marriage gradually came to be accepted by a majority of Americans between the early 2000s and today. Overall, we can say that constitutionalism provides a mechanism within which these debates

⁹¹ The Cold War was undoubtedly one reason for the longevity of the liberalism and democracy correlation.

⁹² Koopmans, p. 123.

⁹³ Ibid.

and, sometimes, conflicts, on rights and values take place. However, the emphasis in German and American constitutionalism over how, and whether, opinions are able to form and become ‘the majority of tomorrow’ on a given issue is very different.

2.2 American and German Constitutionalism

It was the risk of placing too much faith in human benevolence and in the power of intellectual progress and democracy to make human beings more rational and tolerant of others in society which motivates constitutionalism. By the early nineteenth century the Enlightenment had left much of European intellectual thought with a clear sense of modernity. That so many fundamental strands of constitutional liberalism could become unravelled in 1930s Germany illustrates the extent to which the idea of any inevitable sense of progress may be a chimera without struggle or Somekian political action⁹⁴ to secure it.

Can the liberal democratic state simply be a neutral observer as liberal values and opinions compete with illiberal and intolerant ones in Justice Holmes’ ‘marketplace of ideas’⁹⁵? Post 1949 German constitutionalism has emphatically rejected the notion that the state can ever be neutral when popular and democratic forces were advocating policies hostile to either fundamental rights or the constitutional order itself. Put slightly differently, German constitutionalism and its militant democracy is grounded in a total rejection of Koopmans’ premise that “every opinion must have a chance to become more generally accepted” since the experience of the 1930s demonstrates that some of those ‘opinions’ may seek to destroy the values of the constitutional order, and democracy itself.⁹⁶

Some might argue that a democracy that does not give its citizens a chance to destroy it through controversial opinions is not a real democracy. On a purely linguistic level, this is correct, but it reduces democratic theory to a zero sum approach more suited to international relations. In other words, should democracy be purely about the purity and majoritarianism of democratic procedures, regardless of how good or bad the outcomes they deliver in terms of governance, policy outcomes, and the longevity of the system itself? Or is a political system that aims for a principally democratic system, but

⁹⁴ See *supra* note 89.

⁹⁵ *Abrams v United States*, 250 U.S. 616 (1919), p. 630. In this famous free speech case, Holmes argued “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”

⁹⁶ As Joseph Goebbels wrote unashamedly: “This will always remain one of the best jokes of democracy, that it gave its deadly enemies the means by which it was destroyed.” *quoted in* Gregory H Fox and Georg Nolte, ‘Intolerant Democracies’, *Harv. Int’l. LJ*, 36, (1995). p.1.

which puts in place controls to ensure that those democratic decisions do not contravene the fundamental rights of individuals, and the values and laws of the polity as stated in its constitution the best way forward? German constitutionalism is far more in tune with Koopman's final sentence that democracy depends on respect for fundamental rights including human dignity and the protection of minority groups. Thus, in Germany, only through respect for rights—including of freedom of speech and human dignity—could the minority of today become the majority of tomorrow.

Indeed, since 1951 when the *BVerfG* began hearing its first cases, the formation of democratic opinion has been conditional on it being neither a threat to the country's free democratic basic order ("*die freiheitliche demokratische Grundordnung*"), nor the fundamental rights guarantees in the Basic Law. This prioritisation of the principles of human dignity and the free democratic order in the Basic Law trumps liberty and all other rights, whereas in the U.S., liberty would often trump values like human dignity.⁹⁷ In the U.S., the formation of majority opinion was never so tightly regulated, due in large part to the free speech guarantees of the First Amendment, and the important American emphasis on voluntary associations and liberty.

2.2.1 Liberty and Dignity

The liberty-dignity dichotomy between the U.S. and Germany has been crucial in shaping the civic space, in determining how citizens engage in their democracy, and in the struggle for rights. To orient the subsequent analysis of how the judicial decisions of the American and German courts can be understood within the dichotomy of 'liberty' and 'dignity' constitutionalism, a brief elaboration and definition of these concepts will be given. This should also allow for a better understanding of how and why judicial interventions in the processes of representative democracy have occurred in each country. The emphasis on liberty in American constitutionalism has meant that struggles for rights, and the slow emergence of equality and human dignity as constitutional values have been driven primarily by social forces, and only incrementally have come to be recognised by the federal government and Supreme Court. By contrast, the emphasis on human dignity in German constitutionalism is grounded in the view of the autonomous individual as part of a community. The paradox, then, is that the state has a duty to ensure that the freedom of the individual is

⁹⁷ Kommers and Miller, p. 49.

achieved, but only through “synthesis with the community”⁹⁸. The influence of human dignity means, as will be shown, that rights in German constitutionalism are a pre-condition for democracy, not ancillary to it.

Primarily, the utilisation of liberty and dignity within the thesis is contextual, representing the predominant value orientations of each polity, and within which the respective courts act and interpret. Broadly speaking, the emphasis on liberty in American constitutionalism has shaped the constitutional jurisprudence with respect to freedom of speech, and has tended to place an onus on the federal courts to ensure that a particular constitutional right has been infringed before acting. The primary concern of American constitutionalism has therefore been with “limiting the reach of state authority in order to preserve private liberty”⁹⁹. By contrast the emphasis on dignity in German constitutionalism has placed an emphatic duty on the *BVerfG* to ensure that certain rights are realised, particularly in the realm of equality. Thus, as Eberle notes, “the absolute commitment to human dignity in Germany” radiates throughout the legal order”¹⁰⁰. The key difference is that while human dignity was an ideal implicit, but not realised at the American founding, and which only became realised belatedly through the struggles in a society conditioned by liberty, in Germany, human dignity is *the* key value of the constitutional order which shapes state action and the relationship between citizen and state. Rights and democracy can only be exercised in the dignity shaped landscape established by the Basic Law and the *BVerfG*.

The juxtaposition between the American Constitution’s emphasis on liberty and the Basic Law’s greater emphasis on human dignity is not absolute, as will be shown in chapters 4 and 5, but it is a good starting point for understanding the role of the U.S. and German courts in adjudicating value conflicts in their respective systems. One consequence of the liberty-dignity dichotomy is that while American constitutionalism has principally involved, what I call, the ‘*formalisation*’ by the U.S. Supreme Court of value changes *already* taking place in society, Germany’s highly normative constitutionalism—as established by the German founders and as mediated by the *BVerfG*—has been more pedagogic in the *inculcation* of the fundamental values of the

⁹⁸ Cole Durham, ‘General Assessment of The Basic Law - An American View’, in *Germany and Its Basic Law: Past, Present, and Future: A German-American Symposium*, ed. by Paul Kirchhof and Donald P Kommers (Nomos, 1993), p. 45.

⁹⁹ Edward J. Eberle, *Dignity And Liberty : Constitutional Visions in Germany and The United States*, (Westport, Conn. ; London : Praeger, 2002), p. 257.

¹⁰⁰ Ibid. p. 255.

Basic Law in German politics and society. Why this difference exists will be expanded on at length throughout the thesis, but is partly grounded in the American Constitution's authority only over public law. In other words, liberty was partly created as a negative consequence of the Constitution having nothing to say about the private sphere of life. This compares to the Basic Law's comprehensive applicability to all political and legal institutions of the state, and the entire legal system encompassing public and private law.

Summarising the principle of liberty in the United States, Eugene Rostow famously wrote "the root idea of the Constitution is that man can be free because the state is not."¹⁰¹ America's 'liberty' orientated constitutionalism reflected the initial configuration of the relationship between citizen and state; that government was restrained so the individual could be at liberty. The establishment of the American constitution after the near anarchy experienced under the Articles of Confederation presupposed a need to both limit state power, and channel the energy and purposes of government in a way that left citizens a wide sphere of liberty where civil society might be able to flourish. As Eberle puts it "In American law, the Constitution only applies when government acts."¹⁰² It ostensibly has nothing to say about the relationship of Americans to one another or to their society. Only if a space was provided for the people and for civil society to grow and renew itself, it was thought, would America's constitutional experiment be secure. That meant that Americans were free to decide in the course of two centuries of struggle and progress whether other concepts like dignity and equality, or slavery for that matter, were important principles.¹⁰³ Eberle notes that Americans believe in individual liberty more than any other value. "For Americans, this means freedom to do what you choose. From a legal standpoint, such freedom actually means freedom from government and official control."¹⁰⁴

It is this view of liberty which shapes the ongoing discussion in this thesis. Liberty in American constitutionalism has meant that the individual was protected from government interferences through the clear enumeration of the powers of the latter, and through the protections of the Bill of Rights. Thus, the notion of liberty constitutionalism in the subsequent analysis is one based on the idea of the freedom of

¹⁰¹ Eugene V Rostow, 'The Democratic Character of Judicial Review', *Harvard Law Review*, 66, (1952), 195.

¹⁰² Eberle, p. 29.

¹⁰³ See *infra* note 307.

¹⁰⁴ Eberle, p. 6.

the individual from interference by the state in his or her private life. In Supreme Court decisions, the notion of liberty was perhaps best described by Justice Louis Brandeis as “the right to be let alone”¹⁰⁵. To some, however, implicit in the idea of being left alone was “being alone”¹⁰⁶. Thus, liberty meant that the individual was essentially isolated in the community; once emancipated from the state in this way, the particular challenge for American government was how to avoid the atomisation of society, and ensure a citizenry that would uphold their government and their liberty.

Establishing a wall between the public and private spheres may protect liberty, but how can that wall then be surmounted to maintain the connection between the people and their republic? This was the crucial issue that animated Jefferson’s fears about whether Americans could sustain self-government if they only encountered it at election times, and will be discussed at length in Chapter 3. The Constitution, so it was thought, guaranteed the liberty of the people, and in return, the people would preserve it in order to defend their *own* liberties. Here, there are shades of Gouverneur Morris’ admonition that “the French want an American constitution without realising they have no Americans to uphold it.”¹⁰⁷ Morris’s words sound rather hollow in the era of Donald Trump, while the very idea of ‘renewal’ can no longer be assumed to mean ‘progress’. For citizens that value the liberty that American constitutionalism provides, but also cherish a sense of belonging to society, there is often an unbridgeable tension where “freedom and community can be reconciled only in the nostalgic dream of an idealized past.”¹⁰⁸

The original conception of liberty in American constitutionalism, as Rostow conceives it above, caused two problems that are central to our discussion. One, as already mentioned, was that the separation of the public and private might cause citizens and state to become alienated from one another. The other problem which could result from strict non-interference by the state in social life was, as Stephen Holmes notes, “private injustice and oppression” and “an outcropping of brutal monopolies”¹⁰⁹. The evolution of American constitutionalism over more than two centuries of social struggle

¹⁰⁵ *Olmstead v United States*, 277 U.S. 438 (1928), p. 478.

¹⁰⁶ Brian Palmer, ‘The Pursuit of Happiness’, in *Habits of the Heart: Individualism and Commitment in American Life*, ed. by Robert N Bellah, et al. (Univ of California Press, 2007), p. 23.

¹⁰⁷ D Walther, *Gouverneur Morris* (New York and London, 1934), 76, cited in Louis Hartz, *The Liberal Tradition in America : An Interpretation of American Political Thought Since The Revolution*, 2nd Harvest/HBJ edn (San Diego: Harcourt Brace Jovanovich, 1991). p.38

¹⁰⁸ See for example Palmer, p. 24.

¹⁰⁹ Stephen Holmes, *Passions and Constraint: On The Theory of Liberal Democracy*, (University of Chicago Press, 1995), p. 244.

and injustice has been a gradual coming to terms with the reality that government also had a role in preventing private injustice. Here, Sager notes that “the most active and secure ingredients of our liberty-bearing constitutional jurisprudence fit [...] with the broad concerns of equal membership, on the one hand, and fair and open government, on the other.”¹¹⁰ At the heart of the Progressive Movement and the New Deal, according to Richard Rorty, was a quasi-communitarian rhetoric “in which the government ensures equality of opportunity as well as individual liberty”¹¹¹. As will be shown in Chapters 4 and 5, this narrative provided the context for the changing jurisprudence of the Supreme Court regarding equality, the protection of minorities and electoral participation from the late 1930s to the 1960s. However, the traditional resonance of liberty remained strong, and meant that when the Supreme Court got involved in electoral processes in *Baker v Carr* and the other reapportionment cases in response to the demands of civil society, it was extremely tentative about its intervention and proceeded cautiously. It was notable that those opposed to numerically equal representation used the liberty argument. Opponents of a 1948 California ballot initiative on reapportionment claimed that equal numerical representation would ensure the trampling of minority rights by unscrupulous urban majorities.¹¹² The battle against reapportionment was waged by civil society—as befits the U.S. conception of liberty—but it was unable to make progress against state legislatures that refused to reapportion. A clear national consensus had emerged against malapportionment after over a decade of civil society activism,¹¹³ and the Court’s decisions in the reapportionment cases were generally well received across the country.¹¹⁴ The role of the Supreme Court was, thus, largely one of formalising existing value changes within society, which will be examined more closely in Chapter 3.

The German Constitution, the Basic Law (*Grundgesetz*), could hardly be more different. Liberty as understood in the American context has no meaning, because the Basic Law in the jurisprudence of the *BVerfG* views the individual not as an isolated, autonomous person but as part of a community.¹¹⁵ While freedom in the United States comes from the restraint of the state, freedom in the German context can only come from a recognition of the dignity of the individual person as part of their community.

¹¹⁰ Sager, pp. 259-60.

¹¹¹ Richard Rorty, 'Achieving Our Country: Leftist Thought in Twentieth-Century America', (1999), 8.

¹¹² Smith, p. 26.

¹¹³ See *infra* note 416.

¹¹⁴ Smith, p. 233. Gallup Polling indicated a 2 to 1 split in favour of the decisions.

¹¹⁵ *Life Imprisonment Case* 45 BVerfGE 187 (1977); *Investment Aid I Case*.

“Rather than being the key power that needs to be restrained if liberty is to be preserved, the state is seen as the vehicle for achieving freedom.”¹¹⁶

While the constitutional meaning of liberty may be contested, that of dignity is even more so. Ronald Dworkin notes that “the idea of dignity has been stained by overuse and misuse” and that attempts to define it are invariably challenged owing to the fact the dignity is an interpretive conceptive.¹¹⁷ It is important to say that the principle of human dignity has been cited by the Supreme Court as representing an American ideal,¹¹⁸ so as a value it is certainly not absent from American constitutionalism. However, as I have indicated, human dignity is particularly associated with German constitutionalism and means that “each person must always be treated as an end in himself or herself”¹¹⁹. The basis of human dignity in Germany’s Basic Law was not grounded in any particular religious or philosophical tradition, but the jurisprudence of the Court has sometimes adopted “a Kantian view in regarding persons as ends and not merely the objects of manipulation [...]”¹²⁰. The *BVerfG* has articulated a view of human dignity which “while protecting an inner core of personal freedom, concurrently binds the individual to certain norms governing the whole of society.”¹²¹

Human dignity represents the highest value of the Basic Law and is protected from constitutional amendment by the Eternity Clause of Article 79(3). Article 1(1) of the Basic Law states that “Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.” In the Court’s jurisprudence, the principle of dignity applies to the living, the dead, the born and the unborn.¹²² In the Court’s first two decades, it understood and presented itself as a fundamental rights tribunal.¹²³ This emphasis by the Court on human dignity and fundamental rights as a precondition for social and political life reinforced the notion that nothing in the German state was superior to fundamental rights, not even democracy. Germany’s tolerance of the *BVerfG* as guardian of democracy reflects, writes Collings, “a substantive, value-laden

¹¹⁶ Durham, p. 45.

¹¹⁷ Ronald Dworkin, *Justice For Hedgehogs*, (Cambridge, Mass.: Belknap Press of Harvard University Press, 2011), p. 204.

¹¹⁸ See *infra* note 307.

¹¹⁹ Eberle, p. 7.

¹²⁰ Kommers and Miller, p. 358.

¹²¹ *Ibid.* p. 384.

¹²² *Ibid.* p. 358.

¹²³ Justin Collings, *Democracy's Guardians: A History of the German Federal Constitutional Court, 1951-2001*, (OUP Oxford, 2015), p. 64.

definition of democracy, rather than a flaccid valuation of it.”¹²⁴ The early tolerance for the *BVerfG* as the guardian of the Basic Law and German democracy also, though, reflected an old view that politics was a “dirty business”¹²⁵, and a much older respect for law in Germany rooted in the *Rechtsstaat*. This will be assessed more fully in Chapter 6.

2.3 Stability and Renewal

Germany is the ultimate exposition of a state in which constitutionalism has played a significant role in aiding the recovery from extreme nationalism, genocide and totalitarianism. A further reason for the focus on Germany is the prominent influence of post-war German constitutionalism around the world and particularly in the Eastern European states which were reconstituted after the end of the Cold War.¹²⁶ The German Basic Law remains one of the world’s most influential constitutions based on the frequency with which its provisions and institutions have been replicated by newly emerging states around the world.¹²⁷ Some of these states which adopted German constitutional structures such as Hungary and, more lately, Poland, have taken a distinctive turn towards the illiberal and ideological right¹²⁸ in recent years with attacks on the independence of their respective constitutional courts intensifying. These developments highlight the difficulty of liberal democratic states maintaining their liberal values in periods of flux.

Maintaining some equilibrium between the forces of stability and renewal is crucial to ensure a polity can adjust to a changing social context. During the Parliamentary Council which drafted the Basic Law in 1948, some delegates were opposed to the idea of electoral thresholds (*Sperrklauseln*) because they felt they would exclude the types of vibrant political forces that a polity needs to renew itself.¹²⁹ The emergence of the Greens in democratic politics in the 1980s after they finally managed to overcome the 5 percent hurdle, was precisely the type of new political blood that the

¹²⁴ Ibid. p. 219.

¹²⁵ Schlink, pp. 210-11.

¹²⁶ See Eberle, p. 12. See also Bruce Ackerman, 'The Rise of World Constitutionalism', *Virginia Law Review*, (1997).

¹²⁷ Juliane Kokott, 'From Reception and Transplantation to Convergence of Constitutional Models in The Age of Globalization-With Special Reference to The German Basic Law', in *Constitutionalism, Universalism and Democracy: A Comparative Analysis*, ed. by Christian Starck (Nomos-Verlag-Ges., 1999).

¹²⁸ See for example Jan-Werner Müller, 'The Problem With Poland', in *New York Review of Books*, (2016). Müller notes that “Poland and Hungary now offer a toxic ideological brew that is reminiscent of interwar Europe.”

¹²⁹ Ulrich Wenner, *Sperrklauseln im Wahlrecht der Bundesrepublik Deutschland*, (Frankfurt am Main: Peter Lang, 1986), p. 91.

rather staid and conservative German political system needed according to some jurists and politicians.¹³⁰ Although the Greens were only slowly and grudgingly accepted by the established parties into the German party system, the *BVerfG* played a role in this process of integration through several court decisions arising out of constitutional complaints that the Greens made.¹³¹ The ability of a constitutional system to integrate new political parties within its existing institutions in a stable manner—even ones initially viewed with suspicion as the Greens were—is fundamental to the health of a polity. If rising political parties are seen to have been unreasonably excluded from political institutions (i.e. parliamentary seats, committee positions etc), there is a risk, firstly, of increased alienation between voters and their elected representatives, and, ultimately, the danger is that voters lose faith in their democratic institutions.

While this may be true of most democracies, the risk calculation in Germany's case over whether certain parties are acceptable is materially different given its history, its constitutional values and the militant democracy. Thus, political ossification must be balanced against the existential threat posed to a constitutional order if hostile political forces or parties are integrated within its institutions. If such parties enter parliament there are two principle risks: one is that they can gain enough leverage to compromise the values of the polity; another is they can prevent the parliament from functioning, thereby bringing democratic institutions into disrepute. The latter situation can also occur not only through the intent of a party to wreck democratic processes, but through the entry of many innocuous smaller parties into a parliament, thus precipitating legislative gridlock and preventing it from functioning. This is exactly what happened during the Weimar Republic, the experience of which is still used as justification for maintaining electoral thresholds for elections to the *Bundestag*. As will be examined in Chapter 7, the criterion that a legislature must be able to function is still important. However, the Court has seemingly viewed this test as being less important at the EU level, which has caused considerable consternation in the federal government (*Bundesregierung*) and among MEPs in Strasbourg.¹³²

One notable feature of the development of an American constitutionalism which belatedly came to recognise the dignity of man, the expanding scope of equality and individual rights is that its trajectory has exactly paralleled the expansion of the suffrage

¹³⁰ See *infra* note 667.

¹³¹ One of the most notable cases was the *Green Party Exclusion Case*, 70 BVerfGE 324 (1986).

¹³² See *infra* note 717.

and the increase democratisation of political institutions¹³³, not run counter to it. The U.S. Supreme Court has described “the evolving standards of decency that mark the progress of a maturing society”.¹³⁴ Clearly, however, different societies and different sub-sections of society as well as the political branches of government may have their own ideas about how standards of decency may have evolved.¹³⁵ It is in the different interpretations between the judiciary, politics and society that political and constitutional tensions—manageable or dangerous—are generated. Certain contexts and problems strongly favour judicial scrutiny of political institutions. Chief among these are cases where the constitutional system has become ossified, where democratic representation is failing and where individual rights are being infringed.¹³⁶

The connection between democracy and rights is, as I will show, common to both Germany and the United States. As the Supreme Court noted in *Wesberry v Sanders*, “other rights, even the most basic, are illusory if the right to vote is undermined.”¹³⁷ Thus, if a group of politicians, a party or a political class are able to gain power through malapportioned constituencies, or limits on free speech (or no limits¹³⁸), then they would be able to both disenfranchise some citizens and effectively strip them of their constitutional rights. While this association has only emerged in fits and starts in the U.S. Supreme Court’s jurisprudence in the twentieth century, in Germany, the relationship between democracy and rights is inherent in the Basic Law and, as will be shown in Chapters 6 and 7, has been further developed in the *BVerfG*’s jurisprudence.¹³⁹ Fundamental rights in the Basic Law are seen as anterior to the state and as being an absolute precondition for democratic life.¹⁴⁰

A fundamental legal differentiation between American and German constitutionalism is that while the American Constitution only protects individuals against public authority, the German Basic Law has since a famous decision by the *BVerfG* in 1958¹⁴¹, also protected the fundamental rights of German citizens against

¹³³ For example, through the direct election of Senators.

¹³⁴ *Rhodes v Chapman*, 452 US 337 (1981).

¹³⁵ Koopmans, p. 121.

¹³⁶ Such concerns were present in the decision in footnote four of *Carolene Products*.

¹³⁷ *Wesberry v Sanders*, 376 U.S. 549 (1964).

¹³⁸ *Citizens United*, No. 08-205 (2010) (2010).

¹³⁹ In the Basic Law, Article 1 dealing with human dignity, human rights and the legally binding force of basic rights, and Article 20 dealing with Germany’s status as a “democratic and social federal state” and the basis of state authority in the people are the only two articles in the Basic Law protected by the Article 79 eternity clause indicating their relationship and co-dependence.

¹⁴⁰ See for example Collings, p. 219.

¹⁴¹ *Lüth Case*, 7 BVerfGE 198 (1958).

other citizens through the principle of ‘Third Party Effect’. In the U.S. the strictly public purpose of constitutional law maintains the separation between the public and private spheres that was deemed necessary for liberty to flourish. However, that also meant that the constitution was no guarantee against one person abusing the rights of another, particularly in terms of race.¹⁴² Crucially, in terms of the discussion in subsequent chapters and, notably, the views of Justice Oliver Wendell Holmes and Justice Stephen Breyer, the Constitution opened up the possibility of vastly different value interpretations between the Supreme Court and the federal government on the one hand, and those of local groups and local majorities on the other.¹⁴³ These value differences between local and national majorities explained, at their most extreme, the Civil War; however, they also explained segregation and the difference in attitudes to malapportionment between urban majorities and rural ones. The former wanted the equal representation which they believed the Fourteenth Amendment promised, while the latter felt that the very liberty that the Constitution guaranteed would be swept away by the numerical superiority of the urban areas under a system of equal numerical representation between electoral districts. Ultimately, as will be seen in the next chapter and later ones, these differences, firstly, between the values of national and local majorities, and, secondly, between the constitutional interpretation of values and the interpretation held by members of either a national or local majority, can leave the liberal state perilously exposed.

As will be addressed in Chapter 3, the constitutional wall of separation between public and private was central to the fears of Thomas Jefferson about how to sustain a citizen democracy. Jefferson’s fears in this regard also parallel Böckenförde’s, and the ideas of Tocqueville on civil association. Following the *Lüth* decision of 1958, the *BVerfG* held that the Basic Law governs the entire legal system including private law. Stern summarised the effect of this:

The constitution takes on central significance for the legal system as a whole. State power may only be exercised in conformity with the Constitution. The Basic Law, then, lays claim to a comprehensive validity, for it directly shapes the political and

¹⁴² J Patrick White, ‘Warren Court Under Attack: The Role of the Judiciary in a Democratic Society’, *Md. L. Rev.*, 19, (1959), 183. “In 1876, the Court held that the Fourteenth Amendment did not preclude the infringement of a citizen’s rights by another individual acting privately.”

¹⁴³ See *infra* notes 193 & 198 and text.

social life of the community, a feature that is new to German constitutionalism.¹⁴⁴

Lüth will be assessed in more detail in Chapter 6, but its effect was to define a civic republican vision of the individual as part of the community. This vision, which was both legal and civic in a broad sense, laid the foundations for German constitutionalism's all embracing influence over German democracy. The post-1945 human rights consensus was driven especially strongly by the U.S., although its effects on U.S. domestic politics or constitutional law were minimal. However, the new normative outlook shaped the international and European context within which the Basic Law was established. This will now be considered.

2.4 Post 1945 Constitutionalism

In this section I will broadly address the international human rights context of constitutionalism that emerged after 1945 with particular attention to how the promulgation of human rights regimes such as the ECHR and the development of a new conception of the individual in law were used as a basis to lock in domestic political and legal institutions, especially in Europe. I will then address the establishment of dedicated constitutional courts in Europe. Although the United States was one of the key actors driving many of these international developments, their impact and influence on domestic American constitutionalism are less easy to discern. Nevertheless, they were not negligible and this short section highlights some of these international influences driving constitutionalism after 1945.

If one of the fundamental questions for judges engaged in constitutional interpretation before 1945 was 'what sort of polity does the Constitution envisage?', in the decades after 1945 the increasingly normative hue in both German and American constitutional jurisprudence seemed to ask instead 'what sort of polity *should* the Constitution envisage?' While the reasons for this increased normative influence on American and German constitutionalism were, as will be shown in later chapters, of primarily domestic origin, the international context cannot be entirely neglected, particularly with respect to Germany. Here, the country's emerging objective value order, the creation of its powerful constitutional court, its strong emphasis on human rights, and on the centrality of the individual in law, reflected emerging European and

¹⁴⁴ Klaus Stern, 'General Assessment of The Basic Law - A German View', in *Germany and Its Basic Law: Past, Present, and Future: A German-American Symposium*, ed. by Paul Kirchhof and Donald P. Kommers (Nomos, 1993), p. 21.

international trends in these areas. International factors in the United States were far less significant in terms of the specifics of the reapportionment cases assessed in Chapter 5. However, the developing domestic understandings of equality and human dignity which shaped the Supreme Court's decisions from the late 1930s to the 1960s were not immune to the international context. These will be highlighted in Chapter 4 with respect to Harlan Stone's opinion in *Carolene Products*, and the decision in *Brown v Board of Education*.¹⁴⁵

In the aftermath of World War Two we can discern two separate strands of thinking within constitutionalism. One emphasised a focus on judicially enforceable constitutional norms such as we see in the ECHR and the German Basic Law which had binding legal teeth; the other sought to release law and justice from the prison of legal positivism, and place the individual at the centre of all law.¹⁴⁶ The extent to which legal positivism, particularly in Germany, was seen to have facilitated the National Socialist assault on justice, drove the creation of powerful constitutional courts in Europe which would prioritise values inherent in these documents even over the letter of the text itself.¹⁴⁷ Aside from this emphasis on higher law values, and the decline in the relative importance of positive law, Hersch Lauterpacht went one step further. Lauterpacht's insight in 1943 that "the individual human being [...] was the fundamental unit of all law"¹⁴⁸ shaped the perspective of a generation of lawyers and judges on the law.¹⁴⁹

Alex Stone Sweet notes that "the inclination to construct and then secure normative hierarchies is a central focus of European constitutional theory."¹⁵⁰ Germany since the establishment of the Basic Law is perhaps the best example of such a hierarchy—what the *BVerfG* refers to as a "value-oriented order that limits public authority".¹⁵¹ This emerging normative orientation of constitutionalism presupposed the

¹⁴⁵ See *infra* note 307.

¹⁴⁶ See for example H. Lauterpacht, 'The Law of Nations, the Law of Nature and the Rights of Man', *Transactions of the Grotius Society*, 29, (1943); Gustav Radbruch, *Der Mensch in Recht*, (Göttingen: Vandenhoeck and Ruprecht, 1957).

¹⁴⁷ See Neil MacCormick and others, 'Rationales For Precedent', in *Interpreting Precedents : A Comparative Study*, ed. by Neil MacCormick and Robert Samuel Summers (Aldershot: Ashgate/Dartmouth, 1997), pp. 484-85.

¹⁴⁸ Lauterpacht, 'The Law of Nations, the Law of Nature and the Rights of Man', p. 31.

¹⁴⁹ Hersch Lauterpacht and Philippe Sands, *An International Bill of The Rights of Man*, (Oxford : Oxford University Press, 2013), p. vii. Philippe Sands QC calls Lauterpacht's book, "one of the transformative legal works of the twentieth century."

¹⁵⁰ Alec Stone Sweet, 'Why Europe Rejected American Judicial Review: and Why it May Not Matter', *Michigan Law Review*, 101, (2003), 2751.

¹⁵¹ *Elfes*, 6 BVerfGE 32 (1957) (1957).

idea of an “overriding body of ‘law’”¹⁵² containing fundamental rights principles which determined how state power would be applied within the constitutional systems of these countries. Somek notes that “modern constitutionalism is the project to establish and to constrain public power [and] law is the means thereto.”¹⁵³ Law has had a significant role to play in American constitutionalism right back to the founding period.¹⁵⁴ By virtue of its enhanced status after World War Two, law has come to play a more central role in governance and the protection of rights. In this respect what was common to almost all forms of constitutional review in Europe after 1945 was the detachment of the new specialised constitutional courts from the ordinary judiciary so as to “ensure the normative superiority of the constitutional law.”¹⁵⁵

Stone Sweet sees constitutionalism as referring to “the commitment, more or less operative in any polity, to the idea that the interactions that take place within it are to be governed by a set of authoritative rules—the constitutional law.”¹⁵⁶ This definition is suggestive of the dramatic scope of constitutional law as the highest of legal norms after 1945; and, in the use of the word ‘interactions’, Stone Sweet also hints at the Aristotelian polis conception where constitutional law also encompasses the relationship of the citizens with one another—the issue of third-party effect—according to legally enforceable rights norms.¹⁵⁷ Both of these ideas reflect the path taken by Germany after 1949. In his use of the word ‘commitment’ Stone Sweet hints at a metamorphosis in constitutionalism since 1945, reflecting a clearer conception of what can count as permissible action within a state, judgements which come not only from a written text but the entire value orientation of a state’s constitutional order. What has developed, at least in liberal western democracies since 1945, is an official, judicial, and wider cultural recognition that there is, as Judge David Edward suggests, “an overriding and

¹⁵² Interview with Judge David Edward. See *supra* note 81.

¹⁵³ Somek, p. 1.

¹⁵⁴ See Alexander Hamilton, James Madison, and John Jay, ‘Number 78 (Hamilton)’, in *The Federalist Papers*, ed. by Isaac Kramnick (Harmondsworth: Penguin, 1987). *Marbury v. Madison*, 5 US 137 (1803). Marshall noted “The Constitution is either a supreme paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts...”

¹⁵⁵ Sweet, ‘Why Europe Rejected American Judicial Review: and Why it May Not Matter’, p. 2745.

¹⁵⁶ Alec Stone Sweet, *Governing with Judges : Constitutional Politics in Europe*, (Oxford: Oxford University Press, 2000). p.20.

¹⁵⁷ ‘Third-party effect’ refers to the emerging relevance of fundamental rights for private law - an entirely new development in Germany since 1949. As I will show in a later chapter, in the *Lüth Case* this concept is of particular relevance for understanding why the *Bundesverfassungsgericht* came to enunciate its ‘objective value order’. See *Lüth Case*, 7 BVerfGE 198 (1958).

encircling body of law” limiting state power which regulates the context within which the struggle takes place.

The successful post-war development of German constitutionalism was strongly influenced by wider European debates of the period. In the Council of Europe, these debates were primarily centred on the emerging human rights framework which was to become the ECHR as well as on the need to create political stability by learning lessons from the immediate past in order to safeguard the future. Post-war human rights regimes were concerned as much with dealing with the prospect of a communist future as responding to the recent fascist past.¹⁵⁸ Here, there was a clear understanding of the linkage between a country having stable democratic institutions and a non-aggressive outlook towards its neighbours.¹⁵⁹ According to Moravcsik, the motivation of Teitgen, the chief French advocate of the ECHR in the assembly saw the Convention’s purpose as “assuring the stability of German democracy and thereby the security of France.”¹⁶⁰ Unsurprisingly, the most fervent advocates of the ECHR as a bulwark against future tyranny were the representatives from Germany and Italy.¹⁶¹ The intention was that these external legal institutional structures would reinforce Germany’s domestic constitutional institutions in establishing an internal militant democracy. As Blankenburg notes, “constitutions gain increased importance in newly established democratic regimes where politics and law have to be institutionalised from scratch.”¹⁶² Indeed, the establishment of constitutional courts in such countries is often prioritised over the creation of much needed ordinary law courts that can function.¹⁶³

Stone Sweet links the spread of the Kelsenian constitutional court to Italy and Germany after the war to a combination of domestic disenchantment with legislative power unique to those countries and an international trend towards the prioritisation of individual rights over state power. At the domestic level, the experience of fascism

¹⁵⁸ Andrew Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe', *International Organization*, 54, (2000), 237.

¹⁵⁹ The Democratic Peace proposition which dates from the work of Kant in the 18th century was, says Moravcsik, “a central tenet, arguably *the* central tenet of postwar Western planning, as it had been in the thinking of Woodrow Wilson and other liberal statesmen a generation before.” Ibid.

¹⁶⁰ Ibid.

¹⁶¹ Ibid. pp. 237-38. Moravcsik writes that a German representative even went so far as to propose a treaty “obliging all member states to come to each other’s aid, apparently with force, if domestic freedom were threatened.”

¹⁶² Erhard Blankenburg, 'Mobilisation of the German Federal Constitutional Court', in *Constitutional Courts in Comparison: The US Supreme Court and The German Federal Constitutional Court*, ed. by Ralf Rogowski and Thomas Gawron (Berghahn Books, 2002).

¹⁶³ Ibid. p. 157.

before the war and the American occupation after it, observes Stone Sweet, “conspired to fatally undermine the view that parliaments could do no wrong.”¹⁶⁴ Legislatures which had rubber-stamped National Socialist programmes before the war had illustrated the vulnerability of democratic system to abuse if public power was not constrained by a higher constitutional law. Thus, the international dimension provided an institutional safety blanket of regimes that acted to consolidate domestic attempts to restore constitutionalism in Germany and Italy.

The emphasis of states and the international community on constitutionalism and human rights after 1945 ostensibly marked a seismic shift. This shift, prominent in the work of the German legal scholar Gustav Radbruch after 1945, signified that neither legal positivism nor value neutrality could excuse the abuse of individual rights by the state.¹⁶⁵ Yet liberal values entrenching rights, justice and human dignity within domestic constitutional orders will accomplish little if they are not accepted and understood by both state and society. This was the glaring weakness of the secular liberal state identified by Ernst-Wolfgang Böckenförde in 1964. Böckenförde posed his dilemma in the context of Germany’s fragile constitutional order, and as a means of appealing to his fellow Catholics to integrate into a federal republic some were suspicious of. However it is also highly relevant to all states. As welcome as the international emphasis on human rights was, the danger in Böckenförde’s eyes was that its very individualism emancipates individuals “not only from religion but also [...] from the national idea as a homogenizing force.”¹⁶⁶ Thus, the post-1945 focus on human rights and on the individual reinforced important legal principles, but they also reinforced forces of individualism which do not necessarily lend themselves to a dialectic of social cohesion and the imperative of states to remain stable and intact. Hence, the Basic Law had to emphasise its moral code, its idealism on human rights, but then it had to bring the individual back into the fold—without that ‘fold’ being a re-run of the *Volksgemeinschaftsprinzip*. As much, then, as the post-1945 narrative of human rights was welcome after what had gone on before, the ‘Locking in’ of democracy and constitutionalism through mechanisms such as the ECHR merely reinforced the pertinence of Böckenförde’s dilemma of how liberalism could secure itself domestically

¹⁶⁴ Sweet, 'Why Europe Rejected American Judicial Review: and Why it May Not Matter', p. 2769.

¹⁶⁵ Gustav Radbruch, 'Gesetzliches Unrecht und Übergesetzliches Recht', *Süddeutsche Juristen-Zeitung*, 1, (1946).

¹⁶⁶ Böckenförde, p. 45.

without negating its purpose. The response of American and German constitutionalism to this question was very different.

2.5 Conclusion

This chapter has primarily examined the domestic influences on American and German constitutionalism reflecting the overall focus of the enquiry in the following chapters. As noted by Böckenförde, however, the significance of the rise of the individual symbolised by human rights covenants posed challenges for the liberal secular state in how to maintain societal cohesion and its own constitutional values in an era of individualism.

The far more comprehensive role that the *BVerfG* has in German politics helps explain why for all the importance of the U.S. reapportionment cases at the time, the German court has been able to exert a far more positive influence over Germany's democratic institutions and constitutional culture since 1949 than the Supreme Court has been able to over American democracy. Whereas (virtually) all opinions and interests have the chance to become the majority in the United States, in Germany individual rights can be forfeited and political parties can be banned to preserve the state if their aims threaten the free democratic basic order.¹⁶⁷

In the U.S. and Germany, the particular 'liberty' or 'dignity' aspects of American and German constitutionalism have broadly shaped how the Supreme Court and *BVerfG* have responded to the stability and renewal imperative in their democratic political processes. This liberty-dignity difference has also shaped the response of each court as to how it deals with voters being excluded from the political process, and whether it is able to establish conditions favourable to a vibrant liberal democracy with a supportive constitutional culture. Whether the state is more inclined towards liberty or dignity has determined the nature of the polis that has been established. This, in turn, has determined how interventions in the processes of representative democracy occur, and whether values are 'formalised' or 'inculcated'.

When this dichotomy is applied to the legal case studies examined in Chapter 5 and 7, what emerges is a U.S. Supreme Court which at rare moments is able to correct flaws in the political process, as seen in the reapportionment cases. However, the overtly liberty oriented nature of American constitutionalism means that the Court is

¹⁶⁷ Article 18 'Forfeiture of Basic Rights' section.

unable to materially improve the civic space which is essential for a vibrant liberal democracy based on equal respect. As will be seen in Chapter 5, this is best illustrated by the Court's inability to tackle the issue of gerrymandering which has had such a corrosive effect on the middle ground of American politics. The Supreme Court's domain is primarily a legal one, which has limited the lasting impact of its interventions in the political process. By contrast, while the *BVerfG*'s interventions in specific aspects of Germany's electoral processes such as the legal cases examined in Chapter 7 have sometimes been methodologically suspect and counter-productive, its long-term influence on rebuilding a democratic constitutional culture in Germany has been remarkable. The *BVerfG*'s domain is a legal, political and civic one, which has been instrumental in its ability to restore the liberal values behind the constitution of 1849 which had been buried for over a century in Germany. As a result, it now becomes necessary to examine whether such apparently fragile liberal constitutional values and the relationship between citizen and state can be maintained in the absence of supportive identity heavy value systems such as religion or nation, or without reinforcing civil and associational practices.

Chapter 3 - Mediating The Values of The Civic Space

The best in Germany feel that the integrity of society depends on the integrity of its laws. Unhappily here we have also learned that the law depends for its integrity on the integrity of society.¹⁶⁸ (Gitta Sereny, 1967)

The overwhelming majority of our people in every section of the country are united in their respect for observance of the law — even in those cases where they may disagree with that law.[...] A foundation of our American way of life is our national respect for law.¹⁶⁹ (President Dwight D Eisenhower, 1957)

¹⁶⁸ Gitta Sereny, *The German Trauma : Experiences and Reflections, 1938-2001*, (London: Penguin, 2000). p.85. She was referring to the trials of German civilians (former Nazis) in the 1960s for the civilian murders of other Germans (mainly Jews) during the Nazi period.

¹⁶⁹ Dwight D Eisenhower, 'Press Release, Containing Speech on Radio and Television by President Eisenhower, September 24, 1957', (Eisenhower Presidential Library, 1957). Eisenhower was referring to his decision to send troops to uphold the Supreme Court's decision in *Brown v Board of Education*.

This chapter will assess whether liberal values in the form of equality and human dignity—as embodied in German and American constitutionalism—are sufficient to sustain liberal constitutional values in the absence of either internal sources of identity or homogeneity, or a citizenry that participates in their government. This question will be examined with respect to the thoughts and writing of Ernst-Wolfgang Böckenförde on the survival of the liberal secular state, Hannah Arendt’s interpretation of Thomas Jefferson’s fears on the citizen becoming estranged from their government, and Alexis de Tocqueville’s arguments on civil association as the basis for maintaining representative democracy. Although my primary point of reference will remain Germany and the United States, the ideas of Böckenförde on internal bonding forces in the liberal state and Arendt’s interpretation of Jefferson on the public private sphere have implications beyond just these countries. To begin with, a central issue that Böckenförde’s dilemma identifies must first be addressed: whether constitutional values alone can maintain the relationship between citizens and their liberal state.

The chapter will firstly examine how the liberty-dignity dichotomy in American and German constitutionalism plays a key role in whether emerging societal values are formalised or whether constitutional values are inculcated in society. The chapter then considers how the public-private separation that is so essential to liberty also creates a possibly fatal weakness at the heart of republican government: how to keep the emancipated citizen engaged in upholding their constitutional order. This question will be assessed with reference to Hannah Arendt’s interpretation of Jefferson’s concerns on this subject. Conversely, German constitutionalism and the *BVerfG* ran a risk from another perspective: that in inculcating a normative value orientation on the rest of the constitutional order including its political institutions, citizens would see democracy as an empty vessel, and would disengage from politics and political activity. Citizens might then find solace in other forms of identity, social cohesion and value systems that had more resonance in their lives, including religion or nationalism. This does not mean that religion or attachment to country will be antithetical to liberal constitutional values; sometimes they may reinforce them, which was Böckenförde’s hope in 1964.¹⁷⁰ As during the Weimar Republic, it is where ‘traditional’ values and the interpretations of a national majority or significant minority of the population run counter to the values of the constitutional order on an issue of significance to both that the liberal state is at risk. A liberal democratic state which is largely homogeneous where there is less

¹⁷⁰ See *infra* note 249.

differentiation between national and local majority sentiments may have fewer political divisions than in the United States. But where its population turns against the values of the constitutional order, then the state is in far more serious trouble. Ultimately, German and American constitutionalism both have the potential to have a negative impact on liberty: Germany from doing too much and smothering out democratic activity; the U.S. from doing too little and letting republican government die out through ennui and anti-democratic practices like malapportionment or gerrymandering that entrench oligarchical interests.

The fundamental rights provisions at the start of the Basic Law set out a clear value framework which is further buttressed through the eternity clause of Article 79 which prevents changes to those values or to Germany's democratic and federal structure. Principles such as human dignity and the free democratic basic order are eternal according to this logic. Provisions without any scope for constitutional amendment would have doubtless horrified Jefferson by striking at his belief in the possibility of constitutional renewal and a tabula rasa moment.¹⁷¹ Although Jefferson never used the word 'renewal' in describing his 'sovereignty of the living generation' idea of constitutions which lapse every 19 years,¹⁷² a reasonable interpretation would seem to be that he wanted to ensure continued popular 'buy-in' for the constitution, and a continuing bond between the citizens and their republic to avoid ossification. This last point—that republican government would fail because Americans would become aloof from the need to participate in government—will be assessed later in this chapter through Hannah Arendt's interpretation of Jefferson's concerns.

Part of the reason that Jefferson's maddening and whimsical inconsistencies endure is because constitutions seemingly strike at the heart of a fundamental human impulse: the ability to correct mistakes and to alter governing arrangements in response to changing circumstances. This, however, was precisely what Chief Justice John Marshall argued that "a Constitution intended to endure for ages to come" should be capable of doing: "being adapted to the various crises of human affairs."¹⁷³ It was the

¹⁷¹ Perhaps best encapsulated by the opening words of Jefferson's 'Virginia Statute for Religious Freedom': "Whereas Almighty God hath created the mind free."

¹⁷² "The earth belongs in usufruct to the living" and "the dead have neither powers nor rights over it." Thomas Jefferson, James Madison, and James Morton Smith, 'Letter from Jefferson to Madison, 6 September 1789', in *The Republic of Letters: The Correspondence Between Thomas Jefferson and James Madison, 1776-1826*, ed. by James Morton Smith (New York: W.W. Norton and Company, 1995), p. 632.

¹⁷³ *McCulloch v Maryland* 17 US 316 (1819), p. 415.

mutability of constitutional form over time in response to societal developments and events that provided for this, Marshall said. Thus, Marshall's conception of an evolving constitutional understanding may provide a happy medium between Jefferson throwing the baby out with the bath water and Germany's post-war aversion to throwing anything out. However, this requires an appreciation of the dynamic role of values in shaping the formation of opinions which can become more widespread and even, as Koopmans noted, become tomorrow's majority.¹⁷⁴ How American and German constitutionalism shape this process of value formalisation and inculcation is considered now.

3.1 Inculcation or Formalisation

Sheldon Wolin asked of the American Constitution whether the "we" in its preamble was not so much the creator of it, but its "creature".¹⁷⁵ While the answer in America's case may be 'somewhere in between', the creature view is much easier to discern in the case of Germany after 1949. As much as the Basic Law resurrected elements of the Weimar constitution and the country's genuinely liberal constitution of 1849, it also owed something to Jefferson's tabula rasa view of societal rebirth. If American constitutionalism in the twentieth century has rested predominantly on a formalisation of value changes already occurring in society, German constitutionalism's normative bent since 1949 has relied unmistakably on the inculcation of values from political and judicial elites downwards. Put slightly differently, America created a constitution which matched its political culture while in Germany over the last sixty years a political culture has gradually developed which matches its constitution. This raises a number of questions about how the German and American constitutional experiments came to create functioning liberal democracies through very different approaches. The process of conditioning Germany's post-war constitutional culture was driven by a multiplicity of factors including the normative aims of Germany's framers, then by the political leadership of Konrad Adenauer, and ultimately through the judgments of the *BVerfG*. The presence of the Court in public life and a growing awareness on the part of German citizens of its role as guardian of the Basic Law contributed to the civic education of Germans regarding the values of their constitutional order.¹⁷⁶

¹⁷⁴ Koopmans, p. 123.

¹⁷⁵ Wolin, *The Presence of The Past : Essays on The State and The Constitution*, p. 83.

¹⁷⁶ See Collings, p. xxxvi.

What remained in doubt as we shall see in Section 3.3 is whether the values of constitutionalism were sufficient in themselves to uphold the liberal democratic state, absent some other source of social cohesion which could bind citizens to their states as well as to one another. Drawing together Böckenförde's ideas with Hannah Arendt's analysis of Thomas Jefferson's thought in Section 3.4, the means of preserving representative democracy and liberal constitutionalism would seem to be: 1) Participation of the citizens in the affairs of government, or the presence of government in the lives of the people, as Jefferson saw it; 2) a strong respect and affinity among citizens for the liberal democratic values of their constitutional order in their own right; 3) in addition to 2, a reliance on other sources of social cohesion including god, country or some other form of identification. The constitutional cases looked at in the U.S. and Germany both illustrate the involvement of civil society groups and citizens in attempting to ensure their voting rights, and constitutions, were upheld. The political campaign against malapportionment in the U.S., which initially went nowhere due to the intransigence and vested interests of lawmakers who refused to reapportion themselves out of a job, eventually became a legal struggle in the federal courts. In Germany it was the constitutional complaint mechanism which provided the means for citizens and political parties in the two European Parliament cases to petition the *BVerfG*.

Speaking in 1985, Justice Brennan noted that the act of interpretation is “undertaken with full consciousness that it is, in a very real sense, the community's interpretation that is sought.”¹⁷⁷ Depending on the particular case or controversy before the Court, Brennan is correct that a majority of the society may clearly favour the decision that the Court eventually reaches. *Brown v Board of Education*, *Baker v Carr* and the case which recognised gay marriage¹⁷⁸ are all cases where there was either a clear or emerging national consensus, even a bare, one in favour of the decisions that the Court reached. However, as will be outlined in Chapter 4, the idea and implications of a clear national consensus can be more problematic in a continental sized country such as the U.S. where local majorities in different regions or in non-urban areas may have a very different view from the national majority. The ‘which majority?’ question matters a great deal where competing value systems and competing interpretations may be antithetical to each other.

¹⁷⁷ Brennan Jr, p. 25.

¹⁷⁸ *Obergefell v Hodges* 14-556 (2015).

Seeking the community's interpretation may be all well and good if its values respect liberalism and human dignity. However, if its values are akin to Germany's in the late 1930s, or Alabama's in the 1950s, then this is ostensibly where and when constitutionalism matters the most. In other words, constitutionalism comes into its own when the decision of a court or indeed the political branches is *not* one that a majority of the population would likely have come to. Yet such decisions are likely to be the ones which are most essential and difficult for a court to make. Alexander Hamilton put the point best in *Federalist* 78 when he noted that

It would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community.¹⁷⁹

Justice Robert Jackson's majority opinion in *West Virginia v Barnette*¹⁸⁰ is perhaps the most cogent definition of constitutionalism enunciated by a U.S. court in the twentieth century. The First Amendment case, which Friedman regards as "one of the most notable pro-liberties decisions of the era", prompted the *New York Times* to write in response that "when the court rises to its full height it proves its claim to be regarded as one of the great prides of American democracy".¹⁸¹ Jackson's 6-3 majority opinion, which ruled that schoolchildren could not be compelled to salute the flag or be expelled from public schools for not doing so, came at a time when the United States was fighting totalitarianism abroad, and required precisely the sort of fortitude that Hamilton referred to.

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to a vote; they depend on the outcome of no elections.¹⁸²

¹⁷⁹ Hamilton, Madison, and Jay.

¹⁸⁰ *West Virginia State Board of Education v Barnette*, 319 U.S. 624 (1943). *Barnette* was the second of two cases, known as the Flag Salute Cases. In *Barnette*, the Supreme Court reversed its decision in the first flag salute case, *Minersville School District v Gobitis*.

¹⁸¹ *New York Times*, cited in Barry Friedman, 'The Birth of an Academic Obsession: The History of The Countermajoritarian Difficulty, Part Five', *Yale Law Journal*, (2002), 180. On this point about whether the courts can do democracy better than the politicians, see Kim Scheppele, *Democracy by Judiciary*.

¹⁸² *West Virginia State Board of Education v Barnette*. This case can be viewed as one of the most

Jackson's opinion is an important benchmark for it represents an example of what I describe below as *heightened constitutionalism*. In other words, this is a decision which is correct precisely because it would not be, in Justice Brennan's words, the "community's interpretation". *Barnette* speaks to one of the fundamental principles at the heart of constitutionalism, the placing of certain controversies beyond the power of democratic change. *Barnette* is a powerful statement of constitutionalism precisely because it is the Court saying to the state and 'the major voice of the community' during a time of war that free speech requires that no citizen can be forced to salute the flag.

However, the Court's authority to resist the will of the community in this sense nevertheless requires that the community and the other branches of government accept the importance of the constitutional principles at issue—be it freedom of speech, the rule of law or human dignity—as fundamentally important, even if they might disagree with how the Court has applied these principles in a given case; and even if the government and community disagree with the relative importance of the principles, that they recognise the authority of the courts to make the call. One example of this is the enforcement of the Supreme Court decision in *Brown*, which was vigorously supported by President Eisenhower during the Little Rock controversy.¹⁸³

As highlighted in Sections 3.3 and 3.4 with respect to the arguments of Böckenförde about "internal bonding forces"¹⁸⁴ being necessary to preserve the liberal democratic state, and Jefferson's concerns about the public private sphere, there has to be an awareness that the values of constitutionalism, as enforced in the Supreme Court decision in *Barnette* or other cases, may often be antithetical to those forces of social cohesion, be they religion or nation. Inevitably, politicians rarely take kindly to their key policies being subject to legal scrutiny, and the predictable cry goes up about unelected judges overriding policies which a party or politician was elected to implement. Nevertheless, citizens rarely enjoy having their political or civil rights curtailed either. A better understanding among citizens and officials that "part of constitutionalism is the rule of law, and part of the rule of law is allowing courts to decide issues"¹⁸⁵ would minimise such disputes. This requires, as Wolfgang Friedmann notes, "the purposeful collaboration and the constant interplay between legislators,

significant decisions following on the heels of *Caroleene Products* footnote four which will be examined in Chapter 4.

¹⁸³ See *supra* note 169.

¹⁸⁴ Böckenförde, p. 46.

¹⁸⁵ Interview with former ECJ Judge, Sir David Edward, October 2013.

administrators and courts in the articulation and implementation of social change.”¹⁸⁶ In times of normal political and social consensus the interplay between society, the political branches, and the judiciary will be rather predictable with the values of each tending to reaffirm or only slightly alter the predominant normative orientations of the other groups. It is during times of crisis or extreme social and political flux that the formalisation of values versus inculcation of values dichotomy becomes more pertinent and crucial for the survival of a polity. In other words, the state, through the courts and the political branches, must decide whether the ideas of new and burgeoning social forces are ones that it is willing and able to incorporate into the permitted spectrum of constitutional values in the polity.

When values are formalised, as when the Supreme Court voted to desegregate schools in *Brown v Board of Education*, the Court is acting as a guide of sorts. In *Brown*, the Court saw the direction of travel of the national majority or near majority of the population and formalised that emerging national consensus, even while repudiating the local consensus in Kansas and Arkansas that permitted segregation.¹⁸⁷ Thus, while the *Brown* decision formalised and reinforced the value change in the national majority regarding civil rights and the unacceptability of segregation, it also served a pedagogic function in seeking to inculcate the new norm in the whole of society, but especially those parts that were resistant to it. When the Supreme Court prevents the majority of the community, the political branches, or a group in society from carrying out a policy or some desired civic practice—as it did in the free speech case *Barnette* by banning the requirement that all children must salute the flag—the Court’s decision served to reinforce and inculcate the principle of free speech against the state’s desire to inculcate the value of nation during a time of war. Because of the size of the United States and the difference between national and local majority sentiment, *Brown* represented something of an anomaly in the way that it both formalised a value change among a national majority or (near) national majority, while it also sought to inculcate the decision among those groups that would be resistant to it.¹⁸⁸

¹⁸⁶ Wolfgang Friedmann, *Law in A Changing Society*, 2nd edn (Univ of California Press, 1972), p. 74.

¹⁸⁷ See *infra* note 265. As will be seen in Chapter 4, when it made the decision in *Brown*, the Warren Court recognised the emerging post-war consensus on human rights, and even cited Gunnar Myrdal’s seminal book on human dignity. See Gunnar Myrdal, *An American Dilemma, Volume 2: The Negro Problem and Modern Democracy*, (Transaction Publishers, 1944).

¹⁸⁸ On the differences of opinion between national and local majorities, see for example Friedman, ‘Countermajoritarian Difficulty Part Five’, pp. 173-74.

While the formalisation of value changes already in progress in society is more common to American constitutionalism, the inculcation of values also occurs in cases involving what I term *heightened constitutionalism*. Such cases include decisions such as *Barnette* where the Supreme Court blocks or compels an action of another branch of government which would generally be supported by a majority of the people. The essence of value inculcation, then, is that it involves a court enunciating and applying norms as law which a clear majority of the population and their elected representatives may disagree with. Value inculcation is moot if a majority of the population has already accepted the idea, to use *Brown* again, that ‘separate but equal’ schooling was morally unacceptable; the question is then just one of formalising the general mood in the national community. However, this value inculcation in the local majority which rejects the norm will likely be seen by that local majority as undemocratic. Although the decision in *Barnette* can be seen in terms of inculcation of an important right of freedom of expression against a community, those in *Brown* and *Baker* more closely fit the Tocquevillean idea that Court actually was speaking for an emerging or distinct majority, albeit a national one.

Germany in the early 1950s, as we shall see in Chapters 6 and 7, represented a much clearer example of heightened constitutionalism as it was a society that was certainly not in tune with the liberal democratic values of its new constitutional order. The *Bundesverfassungsgericht*’s role was therefore significantly one of entrenching the norms of the Basic Law into all of the political and legal institutions of the constitutional order. Then, following a 1958 decision¹⁸⁹, the entire German legal system including private law became subject to the Basic Law.¹⁹⁰ Inculcating the Basic Law’s values in society was a much longer term process involving the *BVerfG*, different state institutions and, from the mid-1960s onwards, became conjoined with the wider Holocaust consciousness that developed in Germany. In fact, for the first decade of the Federal Republic there were probably few values in German society that the *BVerfG* would have been inclined to formalise.¹⁹¹ The most direct pedagogic effect that the Court has had on German society has been through the constitutional complaint mechanism, examined in Chapter 7. More than 130,000 citizens have petitioned the

¹⁸⁹ *Lüth Case*.

¹⁹⁰ The political institutions (*Bundestag* and *Bundesrat*) of the federal government were broadly in line with the Court as they had appointed its justices. Nevertheless, differences emerged over its independence from the ministry of justice, a battle the Court won.

¹⁹¹ See *infra* note 506 on the lack of popular support for the FRG in the early 1950s.

Court since 1951, which has been credited with developing a broad democratic understanding among the German people¹⁹². However, as will be assessed in Chapter 7, the emergence of the Green Party in the 1980s represented a dramatic change in the political scene, one that the *BVerfG* was generally more accepting of than the established political parties.

3.2 Whose Values?

The American and German acts of constitution forming each represented an attempt to create a new state and a new constitutional identity from a tabula rasa moment. These parallels, though, do not disguise the significant differences between these acts of constitution making. Justice Oliver Holmes observed in his famous dissent in *Lochner v New York* that a constitution is “made for people of fundamentally different views.”¹⁹³ Although undoubtedly true of the United States it seems less true of Germany, for reasons I will explain presently. Holmes might well have said ‘peoples’ for in the American colonies, while there was certainly a common culture, Americans had distinct state, regional and local identities. Sharp differences existed within states and between the propertied and moneyed elites of the northern states and the farm and plantation owners of the south. Thus, even by the time of the Civil War, almost 75 years after the Constitution was established, Robert E Lee and Jefferson Davis still considered themselves citizens of their states first, of the South second and of the United States last.¹⁹⁴

Patrick Henry’s indignation during the Virginia Ratifying Convention at the words in the Constitution’s preamble illustrated the fragmented reality of the American colonies.¹⁹⁵ The United States as a nation did not exist and would not be forged without the struggle and shedding of blood that Justice Holmes referred to.¹⁹⁶ It is often only when various groups and interests clash over their differing conceptions of the constitutional narrative that the Supreme Court’s interpretations became orientation points for the developing nation. Sometimes, however, the divisions in constitutional

¹⁹² Collings, p. xxxvi. See *infra* note 218

¹⁹³ *Lochner v New York* 198 U.S. 45 (1905), p. 76.

¹⁹⁴ Walter F. Murphy, *Constitutional Democracy : Creating and Maintaining a Just Political Order* (Baltimore, MD: Johns Hopkins University Press, 2007). p.351.

¹⁹⁵ “What right had they to say, ‘We, the people’? [...] Who authorized them to speak the language of, ‘We, the people’, instead of, ‘We, the states’? States are the characteristics and the soul of a confederation. If the states be not the agents of this compact, it must be one great, consolidated, national government, of the people of all the states.” Patrick Henry, ‘Patrick Henry, Virginia Ratifying Convention, 4 June 1788’, (Chicago: The University of Chicago, 2000), pp. 21-22).

¹⁹⁶ *State of Missouri v Holland*, 252 U.S. 416 (1920). See *infra* note 254.

meaning between the social practices that are permitted in the civic space and what the state is prepared to accept as law become too wide. In the United States, the Civil War was the end result. As Robert Dahl observed

Given the extreme polarisation in interests, values, and ways of life between the citizens of the slave states and those of the free states, I cannot imagine *any* democratic constitution under which the two sections could have continued to coexist peacefully in one country.¹⁹⁷

After the defeat of the South and the passage of the Reconstruction Amendments, the law of the United States and the constitutional interpretation of the North regarding the abhorrence of slavery won out. But the Union won by force; as Böckenförde would put it, it had to sacrifice its liberalness and resort to war to restore a constitutional interpretation that would *have* to be recognised as law in the South. However, recognition of law did not mean that the South had accepted the values and meaning embodied in that law.

Under normal circumstances in a country as large as the U.S., differences in constitutional meaning between the interpretation of a national majority and that of local majorities need not result in bloodshed. Justice Stephen Breyer noted recently that the Constitution

leaves vast space in between the boundaries, for people themselves through the ballot box to decide what cities, towns, states, what kind of a nation they want. That is what [it] foresees.¹⁹⁸

The Court's role, Breyer added, is more akin to "the boundary commission" of the Constitution, policing only those difficult questions on the edges of the document which people can and will differ on. This view of a constitution establishing a civic space where political and social life can occur—and the role of any court in policing that space—is very important and will be returned to in this chapter and later ones.

The President of the *Bundesverfassungsgericht*, Andreas Voßkuhle, said in a 2013 interview that the role of a court—particularly in the German sense—is defining parameters within which politics can unfold.¹⁹⁹ Breyer's and Voßkuhle's remarks may sound alike, but they are essentially describing two different universes, one broadly

¹⁹⁷ Dahl, p. 95.

¹⁹⁸ 'Justice Stephen Breyer', in *Charlie Rose*.

¹⁹⁹ See *infra* note 723.

conditioned by liberty and one by dignity. More significantly, Breyer is describing, however decorously, a civic space where individuals volunteer, engage in their communities, and live their lives within those spaces. Voßkuhle, though, is describing a purely political space where representative democracy can be allowed to play out; but only if it respects the higher law norms and fundamental rights of the Constitution. This difference sets up the fundamental problem which will be engaged with in this and later chapters, and which Jefferson, Tocqueville, Arendt and Böckenförde have wrestled with: the balance between the state giving citizens the discretion to live their lives free from its interference, while depending on those same citizens to preserve the state, and those very freedoms that the state's existence guarantees.

If the U.S. Constitution was a framework for argument²⁰⁰ among people of different views, Germany's Basic Law ('*Grundgesetz*') was an unambiguous normative attempt to create a liberal democratic constitutional order based on fundamental rights that the state would be duty bound to protect. Although more homogenous than eighteenth century America, Germany, also contained people of different views, some of whom were on the march in opposition to the new FRG and its values.²⁰¹ But whereas the U.S. Constitution had to be ambiguous enough to draw together those different societal threads within a workable framework of governance, the Basic Law was a clear normative constitution which did not seek to reconcile the values of disparate parts of society, but to inculcate its fundamental values *in* society. While the liberal values of the Basic Law represented some of the fruits of the country's two previous liberal constitutions—the Frankfurt Constitution of 1849, which survived less than a day, and the Weimar Constitution of 1919 which lasted fourteen years—they were not rooted deeply in German society.²⁰²

The development of the Basic Law's objective value order by the *Bundesverfassungsgericht* and its implications for stability and renewal will be assessed in Chapter 6. It is also important to recognise that Germany's post-war constitutional institutions were widely seen as just one part of the equation. Finding a value system or sense of identification that would resonate with the Germany people in 1949 and

²⁰⁰ This view of the U.S. Constitution as a framework for argument is also addressed by Ellis. See Joseph J Ellis, 'The Argument', in *American Creation: Triumphs and Tragedies at the Founding of the Republic*, (Random House LLC, 2007), pp. 87-126.

²⁰¹ See *infra* note 496.

²⁰² Bismarck's constitution of 1871, while notionally establishing a parliamentary democracy was merely an appendage to the Prussian military state.

reinforce rather than undermine the values of the Basic Law was every bit as much of a challenge. One widely discussed idea in Germany for decades has been constitutional patriotism (*Verfassungspatriotismus*), which has been developed in the very different work of Jürgen Habermas and Dolf Sternberger²⁰³. For Sternberger, who had experienced the fall of Weimar, the *Verfassungspatriotismus* was one of ‘militancy’ and making the state and its institutions strong enough against its enemies, while for Habermas it was about ‘memory’ and recognising that after the Holocaust the only possible national identity for Germans was one based on a shared public adherence to democratic rights and values. Both of these ideas—of militant democracy and resistant institutions, and public adherence to democratic values—are embodied in important ways within the Basic Law.

Germany’s founding fathers, like America’s, recognised the tentative nature of their creation. Given the fate of the country’s previous attempts at constitution making, the new constitutional document was deliberately not called a constitution (*Verfassung*), but the Basic Law or (*Grundgesetz*)²⁰⁴. This paradoxically had the effect of lowering expectations even as the lofty principles in the Basic Law’s opening articles, and its resistant constitutional structure, sought to ensure that it did not meet the same fate as Weimar. In a country which, despite the Nazi period, still had a profound respect for the law²⁰⁵ and the notion of the *Rechtsstaat*, characterising the Basic Law as ‘fundamental law’ was perhaps wise. Moreover, the designation *Grundgesetz* indicated that the Basic Law was intended to be a temporary and transitional document, which according to the terms of its preamble would apply during a “transitional period” (*Übergangszeit*) until the “entire German people” could “in free self-determination, complete the unity and freedom of Germany”.²⁰⁶ The opportunity to create a new Constitution for a re-unified Germany came in 1991, but it was not one that most Germans, at least in West Germany, had any wish to take advantage of.

3.3 Böckenförde and the Survival of the Liberal State

There is generally little that unites the outlooks, philosophical or otherwise, of Jürgen Habermas and Carl Schmitt. Both, however, saw that in its first decade the

²⁰³ Dolf Sternberger, *Verfassungspatriotismus*, (Insel Verlag, 1990); Jürgen Habermas, *The Postnational Constellation: Political Essays*, (John Wiley & Sons, 2015).

²⁰⁴ The meaning in German is better understood as ‘fundamental law’.

²⁰⁵ See for example Schlink, pp. 210-11.

²⁰⁶ Collings, p. xvi.

Bundesverfassungsgericht had become too powerful.²⁰⁷ For Schmitt, the Court's existence fractured the state's ability to decide, while for Habermas its central role in politics impaired the ability of the people to deliberate.²⁰⁸ As Collings puts it, "Policy came from Bonn; values from Karlsruhe²⁰⁹; but what came from the people?"²¹⁰ This, of course, was the problem. By the late 1950s, the Federal Republic had gained majority acceptance in Germany, aided in large part by spectacular economic growth and a sense of stability.²¹¹ However, the uninvited guest at the German dinner party remained the Nazi period and the willingness of so many Germans to support Hitler, actively or tacitly²¹². While the Basic Law derived its authority and legitimacy from the people²¹³, incorporating their agency into the new body politic was effectively done, writes Möllers, by migrating the constitutional populism of the Reich President under the Weimar Republic to the *BVerfG* under the Basic Law.²¹⁴ Meanwhile, the ability of Germany to maintain a liberal democracy and a sense of societal cohesion and identity purely on the basis of economic growth—and, implicitly, the liberal values being enunciated by the *BVerfG*,—was questioned from the left and right.

These questions revealed doubts as to whether the values of Germany's Karlsruhe inspired constitutionalism—human dignity and democracy itself—were enough to keep liberal democracy alive in a country where democratic institutions had fared so dismally. Schmitt referred to the Court's value order as a 'tyranny of values' and railed against it.²¹⁵ For Schmitt (a Catholic), all significant political concepts were traceable to Christian theology or religious tradition, compared to which the insipid but still menacing Karlsruhe inspired objective value order was a poor substitute.²¹⁶ Schmitt's view was broadly shared by Adenauer's Christian Democrats that "without

²⁰⁷ Ibid. p. 61.

²⁰⁸ Ibid.

²⁰⁹ The location of the Court.

²¹⁰ Collings, p. 61.

²¹¹ Ibid. p. 57.

²¹² The German expression for those people (including bureaucrats and intellectuals) who allowed the Nazis to operate, even while not necessarily sharing their goals is *Mitläufer* (literally 'the people who run with').

²¹³ Article 20(2)

²¹⁴ Christoph Möllers, "We Are (Afraid of) The People': Constituent Power in German Constitutionalism", in *The Paradox of Constitutionalism : Constituent Power and Constitutional Form*, ed. by Martin Loughlin and Neil Walker (Oxford ; New York: Oxford University Press, 2007), p. 96.

²¹⁵ Carl Schmitt, *Die Tyrannei der Werte*, (Duncker & Humblot, 2011).

²¹⁶ Peter E Gordon, 'Between Christian Democracy and Critical Theory: Habermas, Böckenförde, and The Dialectics of Secularization in Postwar Germany', *Social Research: An International Quarterly*, 80, (2013), 180.

the moral nourishment or value-orientations provided by Christianity, liberal democracy would suffer a normative deficit and might not long survive.”²¹⁷

This emphasis on religion was on one level a concerted strategy on the part of Christian Democrats to exculpate themselves from the secular materialism of the Third Reich, and to blame the secular left (i.e. the Social Democrats) for facilitating the Nazis. On any objective level this was absurd as the Social Democrats had generally been among the most vociferous opponents of the Nazis. Despite the political motives and advantage the CDU gained by presenting itself as an alternative to National Socialist secularism, an identity crisis was undoubtedly brewing in the FRG, one which became an open wound after the 1960s with the public debate over how Germany came to terms with its Nazi past (“*Die Vergangenheitsbewältigung*”). Consequently, neither nationalism nor even a milder traditional patriotism were seen as viable sources of either constitutional values or societal cohesion in post-war Germany.

It was ironic, then, that it was the value-assertive doctrine of the priests of the *BVerfG* which has become such an unmistakable part of Germany’s post-1949 constitutional topography. In this respect, the Court’s role has been nothing less than defining the very *telos* of the Basic Law. This was not the *BVerfG* telling Germans what to believe. Rather, the impact of the *BVerfG*’s influence was seen, firstly, through its inculcation of the Basic Law’s emerging values and processes in political institutions, and, secondly, through a growing awareness on the part of ordinary Germans—particularly as a result of the constitutional complaint mechanism—that the Court was there to protect their fundamental and democratic rights. Writing in 1971, Wilhelm Geck argued that “the jurisprudence of the [*Bundesverfassungsgericht*] has, as we all know, fostered the development of true democratic understanding in the Federal Republic.”²¹⁸ As we shall see in Chapter 7, the Court’s role in shaping Germans’ expectations and understandings of democracy has been repeatedly manifested through the constitutional complaints of citizens and political parties; this has been especially the case over the restrictions imposed by the statutory 5 percent hurdle for electoral success.

²¹⁷ Ibid. p. 184.

²¹⁸ Cited in Collings, p. xxxvi.

A further irony is that it was Ernst-Wolfgang Böckenförde, a political theorist²¹⁹ and protégé of Schmitt, who became one of the Court's most influential justices during the 1980s and 1990s. In 1964, Böckenförde gave a lecture, at the heart of which was the question of which values can bind and hold a state and society together in a secular age, and in the absence of the old certainty of religion or the homogeneity provided by nation.²²⁰ "Can the state be built on a 'natural ethics'," he asked, and, "how far can nations united in states live by the guaranteed provision of individual liberty alone, without a unifying bond antecedent to that liberty?"²²¹ In the aftermath of the collapse of the Nazi secular state and in the first decades of the federal republic these questions were seen as existentially significant. After all, nothing in Germany's three previous constitutions of 1849, 1871 and 1919 had done anything to entrench liberal values in German society and its state institutions. From the vantage point of the FRG's first few decades, there was no axiomatic or logical reason why it should be 'fourth time lucky'.

When Böckenförde originally posed these questions in the 1960s, Western liberal democratic societies were again in a growing state of flux due to social changes and movements demanding civil rights and greater equality. These factors were also relevant in Germany, where student protests and the imminent change from the CDU government—which had led the country since the establishment of the FRG—to Willy Brandt's Social Democrats, were cause for alarm in some quarters. Böckenförde feared that the reliance of the FRG since its establishment on the "moral values" of the Basic Law as a basis of shared convictions was replete with dangers, potentially opening the door "to subjectivism and positivism in current assessments of values that, each laying claim to objective validity, tend to destroy rather than foster liberty."²²² In times of changing values and a possibly dissolving social contract, can a normative constitution alone hold a society together? Böckenförde's question is as pertinent to the context of Germany's current debate over migration and the rise of right-wing populism across the West as it was to the social and political flux of the 1960s.

Böckenförde's argument lies at the heart of the stability versus renewal dichotomy assessed thus far. Can the liberal democratic state successfully preserve its own existence on the basis of its constitutional values without indoctrinating those values in society, and thus, according to Böckenförde, sacrificing its fundamental liberal

²¹⁹ Böckenförde was awarded the 2004 Hannah Arendt Prize for Political Thought.

²²⁰ Böckenförde, pp. 44-45.

²²¹ Ibid. p. 44.

²²² Ibid. p. 45.

character? Böckenförde's ultimate point, building on Schmitt's critique of values and around twenty years before he joined the Court, was both a question and a warning. I cite it at length because of its relevance to my central argument.

The question of bonding forces [in society] is posed afresh and reduced to its actual core: *the liberal, secularised state is nourished by presuppositions that it cannot itself guarantee*²²³. That is the great gamble it has made for liberty's sake. On the one hand, it can only survive as a liberal state if the liberty it allows its citizens regulates itself from within on the basis of the moral substance of the individual and the homogeneity of society. On the other hand, it cannot attempt to guarantee those inner regulatory forces by its own efforts—that is to say, with the instruments of legal coercion and authoritative command—without abandoning its liberalness.²²⁴

Böckenförde then takes aim at the extent to which, in inculcating its value system, the state acting through the *BVerfG* had, at once, sacrificed some of the liberalness of the Federal Republic in the interests of its preservation, *and* eroded the wall between the public and private spheres essential to liberty.

The prescribed state ideology, the revival of the Aristotelian polis tradition, and the proclamation of an 'objective system of values' all do away with the very split out of which public liberty is constituted. There is no way back across the threshold of 1789 that does not destroy the state as the order of liberty.²²⁵

The 'split' of course, was that between state and society, between the public and the private, which the French Revolution and, indeed, the American Revolution, had ushered in. Despite being a student of Schmitt, Böckenförde is a Social Democrat by party affiliation. His 'dilemma' posed in 1964 and his later complaints about ossification among the established parties while he was on the Court can be seen not as an attack on the liberal values of the Basic Law, but as a warning that the inculcation of values, even liberal ones, can easily end up negating liberalism itself.

It is also undoubtedly the case that over forty years after Böckenförde penned his dilemma, that the values of the Basic Law have become a reliable moral anchor and identification point for German society as a whole. This may not be fully fledged Habermasian constitutional patriotism but it is not far off. This context of modern

²²³ Emphasis in original.

²²⁴ Böckenförde, p. 45.

²²⁵ Ibid.

liberal Germany is the basis for the analysis of the European Parliament electoral threshold cases in Chapter 7. These cases effectively question whether threats to stability are still sufficient to justify restricting the popular sovereignty of certain German voters. However, a larger question posed by the cases is whether Germany's liberal democracy is strong enough to sustain a normal polity again.

3.4 Arendt, Jefferson and Tocqueville on 'Neighbourliness'

The American framers tried to prevent either legislative or executive tyranny emerging, firstly, by dividing and limiting power and, secondly, by placing faith in the people to uphold the Constitution because it protected their own liberties. *Democracy in America* was, says Wolin, less a paean to democracy than a warning about the dangers of what Tocqueville called "democratic despotism".²²⁶ Americans had developed a political society in which the state was practically invisible.²²⁷ Though invisible at the local level, the state became increasingly complex as the nineteenth century wore on in response, firstly, to the Civil War, and then the co-development of America's industrial society and the movement of people from the countryside to the growing cities. The fear that the state would become invisible in the lives of the people was one that motivated Jefferson. Attempting to reconcile Jefferson's notoriously inconsistent thoughts can be problematic, but one can see perhaps that his 'sovereignty of the living generation' theory was due to a fear of an ossification or disintegration in the civic space, due to individuals voting, but not participating in their republic.

According to Hannah Arendt, Jefferson's fear was that the Constitution had divided the public and private spheres in such a way that all power had been given to the citizens "without giving them the opportunity of *being* republicans and of *acting* as citizens."²²⁸ Jefferson's realisation, says Arendt, was that "unless the country was a living presence in the midst of its citizens" rather than materialising only every two years in the form of elections, then the necessary bonds to maintain representative government would be insufficient.²²⁹ Arendt's insight into Jefferson's thought is, in the post-Trump and post-Brexit world, an important one. Jefferson, she said, had

a foreboding of how dangerous it might be to allow the people a share in public power without providing them at the same time with more public space than the ballot box and with more

²²⁶ Wolin, *The Presence of The Past : Essays on The State and The Constitution*, p. 68.

²²⁷ Ibid.p.68.

²²⁸ Arendt, p. 253.

²²⁹ Ibid.

opportunity to make their voices heard in public than election day.²³⁰

Jefferson's concern about how to sustain representative government and the crucial bond between citizen and state endures.

For Jefferson the optimal way for the citizens to maintain republican government was for the citizen to play an active role in the state, or for the state to be a living presence in the life of the citizen. If maintaining the precious bond between citizen and state was challenging enough in 1826 when Jefferson died, it became even more so with the development of complex modern industrial states in the late nineteenth and early twentieth centuries where the opportunity of citizens to participate in their government at any time other than at elections was becoming more challenging.

It is certainly true that in the United States, as Tocqueville observed, the prevalence of voluntary and religious associations cemented civic loyalties, even though such bonds were at the local rather than national level. For Tocqueville, religion in America was "the first of their political institutions; for if it does not impart a taste for freedom, it facilitates the use of it."²³¹ Liberty for Americans in Tocqueville's era was first and foremost about religious freedom, which was seen as indistinguishable from their status as citizens. The linkage between freedom and religion predated the First Amendment rights of freedom of speech and religion, with one important document being Jefferson's 'Virginia Statute for Religious Freedom'²³². While the migration of large numbers of people to the cities weakened many of those civic and religious bonds—and provided the fodder for electoral malapportionment as the maintenance of naked political power trumped civic engagement—American religion continued to provide an additional source of civic identity well into the second half of the twentieth century.²³³

Tocqueville equally saw that the place where republican government ends and despotism begins is when all relationships and associations between people have broken down except with their immediate families. In such a society, individuals would be "necessarily endeavouring to procure the petty and paltry pleasures with which they glut

²³⁰ Ibid.

²³¹ Alexis De Tocqueville and Patrick Renshaw, *Democracy in America*, (Herts: Wordsworth Editions Limited, 1998), p. 120.

²³² See *supra* note 171.

²³³ See also for example Robert Neelly Bellah, 'Civil Religion in America', in *Beyond Belief: Essays on Religion in a Post-Traditional World* (Berkeley, CA: University of California Press, 1991).

their lives. Each of them, living apart is a stranger to the fate of the rest.” Above such isolated individuals there stands

an immense and tutelary power which takes upon itself alone to secure their gratifications and to watch over their fate.[...] For their happiness such a government willingly labours, but it chooses to be the sole agent and the only arbiter of that happiness.²³⁴

Had Tocqueville anticipated the medium, reality TV programmes like *The Apprentice* would doubtless have been near the top of his definition of ‘paltry pleasures’ and ‘gratifications’. He may not, though, have anticipated that things could deteriorate to such an extent that the host of such a show could *become* the ‘tutelary power’.

In terms of constitutionalism, malapportionment was the result of a failure of state legislatures to keep faith with their own constitutional requirements. The Supreme Court’s solution to malapportionment involved an invocation and reminder of the values generated by the struggles for equality in American society: the Civil War, the end of slavery, Reconstruction, the gradual story of emancipation, and the progressively expanding suffrage for African Americans, non-property owning whites, and women.²³⁵ Yet this only told part of the story of emancipation and growing equality—that in the private sphere—which Böckenförde and Arendt’s insight on Jefferson, remind us of. The Supreme Court’s narrative was about the right to vote, and it was important. But it was, necessarily, as any court decision dealing with a specific case or controversy must be, limited. It was the product of the division between the public and private spheres which occurred at the end of the eighteenth century. Therefore, it could concern itself only with the right to vote every two or four years; it could not deal with either the participation of citizens in their government, or the question of how a society can cohere, absent common values or a common god.

The root causes of malapportionment were, in terms which are all too familiar to us in the post-Brexit and post-Trump context, rapid social change, mass immigration, the growing influence of cities, and a fear in rural areas that the values of god, country, neighbour, community, and civil loyalty—which had held society together up to that

²³⁴ De Tocqueville and Renshaw, p. 358.

²³⁵ The Court noted in *Reynolds v Sims* “History has seen a continuing expansion of the scope of the right of suffrage in this country. [...] The Fifteenth, Seventeenth, Nineteenth, Twenty-third and Twenty-fourth Amendments to the Federal Constitution all involve expansions of the right of suffrage.” *Reynolds*, p. 587.

point—were fracturing.²³⁶ The response of the rural areas in states was to try and hold onto power illegitimately by not reapportioning. The eventual and important *constitutional* solution the Supreme Court provided was a reminder of American progress and the steadily improving state of equality and the human condition. The Court's decisions in the reapportionment cases spoke to the realisation of the country's original principles of equality, and paralleled the liberal values we see as coming out of the post-1945 period. However, the decisions did not address the question of citizens being involved in the civic space through participation, in Arendt's words *as citizens*, merely *as voters*. According to Jeremy Waldron, Arendt de-emphasised the negative liberty aspect of the American Constitution which provided the individual with security against the state, instead focussing on the freedom derived from participation in public affairs.²³⁷

What the reapportionment decisions did not and could not address was how to reconcile the disparate values in the civic space. The values of urban and rural voters, and their interpretations of the Constitution, were simply too far apart for constitutionalism or law to provide a shared vocabulary in the civic space (of the type identified by Orwell²³⁸ in Chapter 1). The danger was that, absent this shared vocabulary and social glue, the values of human dignity and equality as lynchpins of liberal democratic government would be left perilously exposed if they were accepted by only half of a society. The danger of equality without religious belief, said Tocqueville, is it tends to “isolate [men] from one another, to concentrate every man's attention on himself, and it lays open the soul to an inordinate love of material gratification.”²³⁹

One can have social cohesion in a state without it being a being a liberal democracy. In the absence of religion, the *Volksgemeinschaftsprinzip* in Germany or ‘the dictatorship of the proletariat’ could probably create a degree of social cohesion. But it would mean a great deal of control of the public sphere over the private sphere so liberal values would be snuffed out. The emergence of secular liberal democracy out of the French Revolution split the public and private spheres asunder. Thus was a tenuous bond established between citizen and state. Once the Declaration of the Rights of Man

²³⁶ Smith, pp. 14-16.

²³⁷ Waldron, *Political Political Theory: Essays on Institutions*, p. 296.

²³⁸ See *supra* note 55.

²³⁹ De Tocqueville and Renshaw, p. 183.

had “stood the individual on his own two feet and handed him his liberty,” the problem for government became “how to integrate the emancipated individual into the state.”²⁴⁰ Individuals increasingly concerned themselves with emancipation in the private sphere and their only activity in the public sphere, if at all, was voting at election times every few years. The fundamental values of equality and human dignity in constitutionalism since 1945 are essentially private values in the sense that the state has a duty to provide a sphere for the citizen to live their life where they have equality and human dignity, and, as Hobbes reminds us, security. Within this constitutional constellation the citizen’s sole role is, as Arendt suggests, that they vote every two, four or five years. As Jefferson suggests, that constitutes a fragile basis for maintaining representative government in the sense of a republic.

This was the crux of Böckenförde’s lecture in 1964, and while it was an especially pertinent warning to Germany, it is equally prescient with respect to the United States and indeed most modern societies. The “split” between the public and private that Böckenförde refers to when he says “there is no way back across the threshold of 1789 that does not destroy the state as the order of liberty”²⁴¹ is exactly the same division between the public and private that Arendt describes Jefferson as fearful of. That division creates a zone of liberty for the citizens, but the preservation of that zone relies on the collective agency of the citizens to maintain their constitutional order. Böckenförde’s key concern was how, in the absence of religion, the vast majority of individuals can maintain the necessary bonds of social cohesion to preserve the peace of their society, and ultimately their liberal democratic polity. In a clear sense then, Böckenförde and Jefferson are attempting to address the same problem of how to sustain representative government, albeit from different perspectives; Böckenförde, in terms of whether the liberal state—and, implicitly, its constitutional values—can be sustained without internal bonding forces; Jefferson, through the participation of the citizen in government, or the presence of government in the life of the citizen. For Germany after 1949, the constitutional order and its political system had liberal values, but they were not deeply rooted in society. However, there was a growing amount of social cohesion, but it was based on economic growth and a basic but rather unenthusiastic acceptance of the federal republic at least for the first couple of decades. This is the context which prompts Böckenförde’s concern about how one maintains the

²⁴⁰ Böckenförde, p. 44.

²⁴¹ Ibid. p. 45.

social cohesion in a secular age in order to maintain the liberal democratic constitutional order itself.

One *sui generis* explanation for what eventually provided Germany with the values of social cohesion to reinforce the values of liberal constitutionalism being disseminated by the *Bundesverfassungsgericht* was the growing Holocaust consciousness in Germany, and the acrimonious debate over coming to terms with the Nazi past (*die Vergangenheitsbewältigung*). That it was acrimonious does not sound like a recipe for social cohesion, and it was not at first as younger Germans asked difficult questions about what their parents and grandparents had done during the Nazi period. In the longer term, younger Germans who came of age after the 1960s and who had been inculcated in the history of the Nazi period and the Holocaust were better able to understand how the liberal democratic values of the Basic Law were a response to the Holocaust. Böckenförde could not have realised it in 1964, but the decades long debate and angst caused by the debate over the Nazi period that was about to be unleashed, and that many Germans at the time, as Gitta Sereny noted, would rather have left buried,²⁴² would in time provide a strong foundation for Germany's liberal democracy.

The initial fragility of Germany's liberal democracy after 1949 was mainly due to the absence of a deep constitutional and political culture which might have allowed democratic values to take root. What initially proved fundamental to the recovery of German constitutionalism in 1949 was Germany's respect for the law, which will be assessed in Chapter 6. The longer-term question regarding the success of the Basic Law was whether the *Bundesverfassungsgericht's* objective value order that so offended Schmitt, and its 'image of man' conception of the German polis, could succeed in binding Germans to their liberal democratic constitution in the absence of god, nation, or other salutary associational pursuits.

The 'image of man' is a choice of words which the *BVerfG* has repeatedly invoked as representing the central idea of the relationship between the individual and community lying at the heart of the Basic Law.²⁴³ According to this logic, rights could only be realised in a civic space which recognised the relationships between individuals. Pure equality on the basis of individuality rather than community would be dangerous

²⁴² For an excellent contemporary account written in 1967 of the fear of authority among younger Germans and their questions over the Holocaust see Gitta Sereny, 'Generation Without a Past', in *The German Trauma : Experiences and Reflections, 1938-2001*, (London: Penguin, 2001, 2000), pp. 59-86.

²⁴³ *Life Imprisonment Case*

because once “deprived of the internal bonding forces” upon which it relies, the secular liberal state, says Böckenförde, is forced down the social utopian path of attempting to do ever more for its citizens and even fulfil their “eudaemonistic expectations”.²⁴⁴

The dichotomy between constitutional values and the bonds of social cohesion highlighted by Böckenförde’s dilemma is one that will be returned to. Given Böckenförde’s theoretical and historical concerns in 1964 on how Germany’s liberal constitutional democracy could maintain its bonds with the German people, it is perhaps no surprise that as a justice on the *Bundesverfassungsgericht* from 1983 to 1996 he emerged as a defender of emerging smaller parties like the Greens, while criticising the established parties for their “oligarchical”²⁴⁵ tendency. As important as stability is and was in the German context, Böckenförde recognised when he was on the court that constitutional representative democracy had to remain representative in order to maintain its connection with the citizens. This question is assessed in greater depth in Chapters 6 and 7 regarding German constitutionalism and the European Parliament electoral threshold cases.

3.5 Conclusion

For a concerned German social democrat like Böckenförde, the fear in 1964 would have been that Germany’s increasingly strong liberal constitutionalism, as embodied in its powerful new constitutional court, had only been superficially accepted by Germans as a result of international institutions and the country’s economic miracle. As will be addressed in Chapters 6 and 7, Germany and its people ultimately answered Böckenförde’s concerns about whether the country could sustain liberal democracy, although I think the reasons had as much to do with the country’s willingness to confront its traumatic past, as either internal bonding forces such as religion, or the objective value order of the *Bundesverfassungsgericht*. What remained unanswered was a broader question Böckenförde posed that applied to all liberal secular states wanting to maintain social cohesion and their constitutional institutions: “On what will that state base itself in time of crisis?”²⁴⁶ As will be addressed in later chapters, this question is of ongoing relevance.

Böckenförde’s argument was that the liberal secular state rested on values which it could not guarantee. The state’s options were to use coercion to sustain those values,

²⁴⁴ Böckenförde, pp. 45-46.

²⁴⁵ *Party Finance V Case*, 73 BVerfG 40 (1986).

²⁴⁶ Böckenförde, p. 46.

but sacrifice its liberalness, or that it rely on other internal bonding forces such as religion or nation.²⁴⁷ Böckenförde stated recently that his lecture in 1964 was an appeal to his fellow Catholics to see the liberal secular state not as a threat to their religion but as an important means of guaranteeing the liberty which was essential to religious belief.²⁴⁸ By integrating into the Federal Republic, noted Böckenförde, Catholics would further strengthen the state through the addition of their “ethical imprint”.²⁴⁹

Thus, whether religion supports democracy—by, as Tocqueville saw it, teaching Americans “the art of being free”²⁵⁰—or the other way around, we can at least see a relationship where they are mutually supportive without having to decide which comes first. I think Böckenförde’s dilemma can best be seen today as emphasising the practical, ethical, dialectical, and associational tools which religion, and other forms of social bonding or civic associational activity provide as a means of supporting liberal democracy, its institutions and its values.

The key concern which we return to in the remaining chapters is whether the constitutional values which the respective courts have enunciated in their reapportionment and electoral threshold decisions are ones which can maintain the relationship between the state and citizens, absent other sources of social cohesion such as nation or religion? The context within which this question is asked is the liberty and dignity oriented paradigms of constitutionalism outlined thus far. What I called ‘heightened’ constitutionalism in the flag salute case²⁵¹ was an example of the Court defying the will of an unambiguous local and national majority during a time of war. *Barnette* was heard around five years after *Carolene Products*²⁵², and—with its protection of a religious minority, Jehovah’s Witnesses, entirely ticks the boxes of footnote four, and fits the expanding scope of equality assessed in the next chapter. Having examined how values are mediated in the civic space, we turn now to the question of how the Supreme Court has interpreted values institutionally.

²⁴⁷ Ibid.

²⁴⁸ Christian Rath, ‘Freiheit ist Ansteckend’, in *Die Tageszeitung*, (Berlin: TAZ Verlags 2009).

²⁴⁹ Ibid.

²⁵⁰ Alexis De Tocqueville, *Democracy in America*, (Regnery Publishing, 2003), p. 241.

²⁵¹ *Barnette*.

²⁵² See *supra* note 39.

Chapter 4 - People of Different Views

A legal interpretation cannot be valid if no one is prepared to live by it.²⁵³ (Robert Cover)

When we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realise or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience, and not merely in that of what was said a hundred years ago.²⁵⁴ (Oliver Wendell Holmes Jr)

²⁵³ Robert M. Cover, 'The Supreme Court 1982 Term Foreword: Nomos and Narrative', *Harvard Law Review*, 97, (1983), 44.

²⁵⁴ *State of Missouri v Holland*.

The previous chapter examined alternative sources of values, identity and association in the civic space which undermine or reinforce the constitutional values of the liberal state. This chapter switches to assess the legal / institutional space within which constitutional values emerge and are interpreted by the U.S. federal courts. Chapters 4 and 5 are concerned with the crisis in American representative democracy prior to the mid-1960s due to the widespread practice of malapportionment. This involved the effective exclusion of non-rural voters from the political process by local 'state' majorities through the debasement of their votes. This chapter examines the development of American constitutionalism and the evolving understanding of equality and rights in the Supreme Court's jurisprudence, as well as the theoretical, historical and jurisprudential roots which shaped the relationship between the Supreme Court, the federal government, and national and local majorities.

Prior to and after the Civil War, it did not particularly matter if local majorities subscribed to different constitutional interpretations and values in their lives and social practices provided that the interpretation did not clash with the law of the state on a vital issue for the federal government. To paraphrase Justice Holmes and Justice Breyer, the Constitution was intended to allow for this flexibility in meaning among people of different views. The Civil War effectively broke the Constitution by sacrificing its liberalness, real or pretended, in order to save the state itself.²⁵⁵ Segregation and civil rights were, likewise, two issues which stretched constitutional meaning to breaking point and beyond.

The important distinction here is between the civic space of constitutional meaning and interpretation examined in the previous chapter and the legal / institutional space of interpretation examined in the chapter ahead. What the victory of North over South could not do was make the values of equality and emancipation more important to the citizens in the South than their own bonds of homogeneity which rejected Lincoln's emancipatory vision. The Supreme Court and the federal government could impose force and federal law on the states in the legal / institutional space, but the constitutional values embodied in those laws were rejected in the lives and social practices of those local majorities. As seen in the last chapter in the ideas of Böckenförde, where differences exist between the authoritative values of the state which sustain constitutional meaning and, thus, law, and the values or internal bonding forces

²⁵⁵ As Lincoln put it at the time, "Must a government of necessity be too strong for the liberties of its people, or too weak to maintain its own existence?" See also *infra* note 568

which hold individuals, groups and majorities together, then the survival of the state can be at risk.

While Alexander Bickel looked at the Supreme Court in terms of the countermajoritarian difficulty, this chapter assesses the Court's interpretive role and emerging doctrine of equality through the evolving prism of constitutionalism itself. One of the problems with the countermajoritarian difficulty is that it does not specify 'which majority' is the relevant one. As addressed in the previous chapter, the differences between national and local majority sentiment started the Civil War, and are deeply implicated in the malapportionment problem which will be examined in Chapter 5. The question of majoritarianism, however, is a useful springboard to assess the Court's role in supporting emerging national majority sentiment, its relationship with the federal government, and its emerging role after 1937 as a defender of minority rights. The Court's institutional role in steering American constitutionalism towards a more emancipatory vision of equality and human dignity was, more often than not, done by overruling state laws or practices and was often supported by the federal government, as Whittington argues.²⁵⁶ The picture of constitutionalism which emerges has been mostly driven by political action, and legislative and constitutional initiatives in response to social struggles and conflicts, and through judicial interpretations. As Walter Murphy notes

The adoption of the Thirteenth and Fourteenth Amendments, passage of legislation authorising the federal courts to interpret these provisions, and judicial interpretations of them, and the Bill of Rights, have solidified constitutionalism as part of the larger political system, though one should not underestimate legislative and executive action, or the synergistic effects of political institutions and culture.²⁵⁷

This passage by Murphy bridges the content of Chapter 4 and Chapter 5 and more broadly reflects the dichotomy between the legal / institutional space—characterised by legislative and judicial initiatives solidifying constitutionalism—and the civic space—where cultural and traditional values can support or undermine constitutional values.

²⁵⁶ Keith E Whittington, 'Political Supports for The Exercise Of Judicial Review by The United States Supreme Court', *American political science review*, 99, (2005).

²⁵⁷ Walter F Murphy, 'Excluding Political Parties: Problems for Democratic and Constitutional Theory', in *Germany and its Basic Law: Past, Present, And Future: A German-American Symposium*, ed. by Paul Kirchhof and Donald P Kommers (Nomos, 1993), pp. 177-78.

In the chapter ahead, I will begin by briefly highlighting the ‘countermajoritarian difficulty’ before then addressing the more central question to the analysis in the American chapters of ‘which majority is relevant?’ The chapter then addresses the concerns of Madison and Jefferson over the dangers of majority tyranny at the local level as exemplified by the state legislatures, and their gradual recognition that the federal courts provide a means of reining in the states, albeit in the legal / institutional space. Section 4.3 considers the development of the modern court, its essentially majoritarian character and how administrative and personnel changes laid the groundwork for the emergence of a constitutionalism which would prioritise minority rights and the access of voters to democratic processes. The chapter then proceeds to the Holmesian idea that a constitution is “for people of different views” which conceptually bridges the concerns of Chapters 3, 4 and 5. This chapter addresses the key tension inherent in America’s liberty orientated constitutionalism between a constitution designed to liberate its citizens from the clutches of government, but is cohesive enough to hold a people together, a constitution general enough to allow people to live their lives without restraint, but which must nevertheless resolve legal disputes. The chapter then considers the gradual incorporation of the Bill of Rights against the states, and the recognition of many lawyers that the state governments were the quintessential threat to individual rights. To close, I consider the extent to which *Carolene Products* footnote four was a catalyst for the growing focus on equality and human dignity after 1945. In conclusion, I consider whether the emerging individual rights discourse that emerged after footnote four marked the beginnings of a geographic schism between national and local majorities, and between urban and rural areas in the United States, based on their predominant value orientations.

4.1 Which Majority?

As stated in Chapter 1, the main concern of constitutionalism has been mitigating threats to the state from too much participation or too little participation in the democratic process. The stability-renewal dichotomy at the heart of the investigation also frames some of the questions in this chapter and the next. These examine how developments in American constitutionalism since the founding period help explain the Court’s intervention in the malapportionment issue and its eventual one person one vote decisions. The one person one vote decision cannot simply be seen through the prism of an expanding franchise but as part of a developing understanding of how equality and human dignity have come to reflect the Court’s idea of the values of a maturing

society.²⁵⁸ As Justice William Douglas reiterated in *Gray v Sanders*, “the right to have one’s vote counted has the same dignity as the right to put a ballot in a box.”²⁵⁹

As with the actions of the *BVerfG* in Chapter 7 which sought to remedy ossification in the German political system, the irony here is that it was the Supreme Court rather than elected politicians breathing life into the principle of political equality, which the Court argued demanded equal representation for equal numbers of people. One aspect of this constitutional evolution was the Court’s own interpretive journey of renewal. After the Court’s intensely countermajoritarian ‘Lochner period’(c.1890-1937)²⁶⁰, where it interpreted the Fourteenth Amendment as protecting economic interests and private property rather than individual rights,²⁶¹ it dramatically changed course in the late 1930s. This resulted in a belated acceptance of progressive legislation, a truce with Franklin Roosevelt over the New Deal legislation, and the famous footnote four in *United States v Carolene Products*²⁶². *Carolene*, which will be assessed in Section 4.6, effectively signalled that the Court would only consider checking laws which contravened federally protected rights or which targeted the participation of minorities in the political process.

For Friedman, the puzzle with the ‘countermajoritarian difficulty’ is that it encompasses very different examples of Supreme Court decision-making across decades, even when it was clear that decisions such as *Brown v Board of Education* in 1954 and the reapportionment decisions of the 1960s carried broad popular support either at the national or local level, and sometimes both. Friedman differentiates between two different types of criticism that the Court faced:

Even popular dissenters from Court decisions did not claim that the Court was interfering with popular will, as much as that the Court was rushing ahead of legislative (and perhaps) popular decision-making. The claims, though easily confused, are different. The countermajoritarian criticism applies to courts striking down laws that had been enacted by popular legislative

²⁵⁸ See *supra* note 134.

²⁵⁹ *Gray v Sanders*, 372 U.S. 368 (1963), p. 380.

²⁶⁰ Posterity has referred to the Court that made the decision in *Lochner v New York* not by the name of the Chief Justice as is common but by its most infamous decision. The decision, which struck down a New York state statute aimed at preventing bakery workers having to work over 60 hours a week, has received more criticism than perhaps any other in the twentieth century.

²⁶¹ See Joel B. Grossman and Charles R. Epp, 'Agenda Formation on the Policy Active U.S. Supreme Court', in *Constitutional Courts in Comparison: The US Supreme Court and The German Federal Constitutional Court*, ed. by Ralf Rogowski and Thomas Gawron (Berghahn Books, 2002), p. 107.

²⁶² *Carolene Products*.

bodies, at least theoretically with broad popular support. This was precisely the case during the Progressive Era, with relatively fresh legislation in constant jeopardy.²⁶³ During the Warren era, however, the Court's decisions typically did not invalidate newly enacted legislation. Rather, the Court moved to address social problems that were already of concern to the public.²⁶⁴

What the counter-majoritarian difficulty does not address, then, is which majority is the relevant one and, as seen in Chapter 3, whose values are relevant? Majority opinions vary from state to state and region to region, and a Supreme Court decision that might be enthusiastically received in northern states might be vilified in the South. This difference in majority opinion views between regions was highlighted by Friedman who asked: "Is the ruling 'countermajoritarian' because it thwarts a majority in the state, or majoritarian as reflecting a national consensus?"²⁶⁵

This regional differentiation exactly reflected attitudes to the Court's unanimous decision in *Brown v Board of Education* in 1954.²⁶⁶ As Friedman notes, national public opinion was "strongly supportive" of the decision in *Brown*, while the outraged Southerners who attacked the decision did not do so on countermajoritarian grounds.²⁶⁷ Instead, the arguments those in the South used attacking the *Brown* decision were primarily "grounded in respect for minority viewpoints and states' rights".²⁶⁸ This picture was also reflected in the very different value systems that were clashing in the reapportionment cases.

The emphasis of the aggrieved Southerners on the idea that their minority rights were being violated as seen in the *Brown* decision exactly mirrored the response of rural areas across the country to reapportionment proposals going back to the 1940s.²⁶⁹ For our present purposes, this question of national versus local majorities is important for highlighting the potential for state fragmentation from the essential 'value' differences between a national and local majority on an issue of vital importance for the state. What this division between local and national majorities indicates—apart from the adjective

²⁶³ i.e. *Lochner* and other anti-redistributionist decisions by the Court.

²⁶⁴ Friedman, 'Countermajoritarian Difficulty Part Five', p. 222.

²⁶⁵ Ibid. pp. 173-74.

²⁶⁶ "A Gallup poll administered within a week of the *Brown* decision indicated that 54% of those polled approved of the ruling, 41% disapproved.[...] Regionally, respondents in the East (72% approved) West (65% approved) and Midwest (57% approved) generally favoured the decision, while those polled in the South did not (24% approved and 71% disapproved.)" Cited in, *ibid.* p. 186.

²⁶⁷ Ibid. p. 175.

²⁶⁸ Ibid.

²⁶⁹ See *supra* note 112.

‘countermajoritarian’ only being statistically accurate around 50 percent of the time at best—was that an essential value or identity difference existed between constitutional values as interpreted by the Supreme Court and accepted by a national majority, on the one hand, and the values and interpretations of different communities who disagree with the Supreme Court’s and national majority’s interpretation, on the other.

To understand how this value and identity schism between nation and local majorities became so central to the development of American constitutionalism it is first necessary to understand the fears of Madison and Jefferson over the dangers of local majority tyranny. It was the views of Madison and Jefferson on the dangers of legislative tyranny and the necessity of a judicial check on the states that ensured that the Supreme Court would have a role in supporting federal power and formalising the emerging values of the national majority.

4.2 A Legal Check on Local Majorities

For many of the founders the necessity of a new republican government of the United States was precisely because the popularly elected state legislatures had been guilty of pandering to mob tendencies and passing retroactive laws which often stripped property-holders of rights. Summarising the “calamitous” effects of the “mutable policy” of state legislatures, Madison wrote in *Federalist* 62 that

it poisons the blessings of liberty itself. It will be of little avail to the people that the laws are made by men of their own choice if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is today, can guess what it will be tomorrow.²⁷⁰

From the outset, and even before the addition of the Bill of Rights, through their emphasis on representative democracy over direct democracy with only the House of Representatives directly elected, the framers seemed to have expressed their concerns over the dangers of popular majorities. In an era when the franchise was very limited, Madison’s main concern was less people’s ability to participate in the democratic process and more the protection of private rights from what he viewed as the principal threat—the state legislatures.²⁷¹ Preserving rights for the minority was best achieved,

²⁷⁰ James Madison, Alexander Hamilton, and John Jay, 'Number 62 (Madison)', in *The Federalist Papers*, ed. by Isaac Kramnick (Harmondsworth: Penguin, 1987), p. 368.

²⁷¹ According to Wolin, in writing *Democracy in America*, Tocqueville had borrowed liberally from the

argued Madison, both through a balance between social forces in the much larger society created by Union, and also through an additional check at the federal level, which ultimately became the courts. The first part of Madison's equation worked, writes John Hart Ely, till about the fiftieth anniversary of the republic, when it became clear that the greater plurality of interests in a larger republic was no impediment to the oppression of one group by another.²⁷² Madison and the other framers failed to foresee the crystallising effect that parties would have on previously disaggregated interests within the political system.

The challenge for Madison and the other founders, as Bellah noted was the particular problem of developing "public virtues in democratic citizens."²⁷³ The Constitution was designed to bring this about through the instrumentality of checks and balances to offset "the centrifugal and anarchic tendency of competitive individual and local self-interest," and so foster what Madison called the "permanent and aggregate interests of the community."²⁷⁴ Although this vindicated their belief in the federal courts as a secondary check on state laws seeking to oppress the minority, the expansion of the franchise and the growing significance of democracy within the republican system provided states—through their control over the machinery of state and federal elections—with additional means to oppress minority groups. This flaw in republican theory lay at the heart of the malapportionment problem, but it is one which constitutionalism provided a 'legal' solution for in the form of the federal courts.

A number of concerns drove Jefferson and Madison to see the judicial branch as an essential check on the states. Those reasons allow us to see that the founders saw the judicial branch as an important check on iniquitous state laws and the judiciary as the defenders of rights. The clear preference of the framers, firstly, for constitutionalism and secondly, judicial checks on state laws, runs counter to claims that the framers had intended that constitutional limits would be enforced through politics rather than law.²⁷⁵ In fact, the evidence seems to be that the framers saw politics and law as both very

writing of Madison and Hamilton in *The Federalist Papers*, particularly the anti-majoritarian tone of its arguments, and "its distrust of the state legislatures, which [...] had often been controlled by popular forces". Wolin, *The Presence of The Past : Essays on The State and The Constitution*, p. 72.

²⁷² Ely, p. 81.

²⁷³ Bellah, p. 254.

²⁷⁴ Ibid.255

²⁷⁵ See *infra* note 281.

important. As Madison put it, “ambition must be made to counteract ambition.”²⁷⁶ A further dimension of the countermajoritarian critique has it that Madison believed that interests in society would be able to balance one another at the national level, thus minimising tyrannical influences.²⁷⁷ Broadly this is correct, at least in the pre-Trumpian era. However, malapportionment was a classic local problem of precisely the type Madison had identified as exemplifying the iniquity of state politics.

Madison had seen first-hand the effects of invidious state laws under the Articles of Confederation where populist majorities ran roughshod over the rights of the minority. By 1787, even initially ardent republicans had become disenchanted by what they viewed as the near tragic experience under popularly responsive state governments.²⁷⁸ In October 1788 Madison told Jefferson that he had come to believe that

the invasion of private rights is chiefly to be apprehended, not from acts of government contrary to the sense of its constituents, but from acts in which government is the mere instrument of the major number of its constituents.²⁷⁹

This role of the people in bringing about constitutional change from the founding period onwards through ordinary politics has been the subject of much scholarly attention.²⁸⁰ However, the specific nature of the people’s involvement, the forms it is manifested in and what it achieves is often harder to pin down. Kramer is right to say that popular pressure from the people was indispensable in bringing “an unruly authority to heel”.²⁸¹ However, his claim that the founders had a uniform position in expecting that constitutional limits would be enforced through politics and by the people rather than in the courts seems contradicted by Madison and Jefferson (below).²⁸² As the exchange between them below makes clear, they came to recognise that the courts would sometimes be an indispensable check on tyrannical government when all other avenues failed.

²⁷⁶ Madison was clearly referring to all three departments including the judiciary and noted “Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be merely nominal.” Madison, Hamilton, and Jay, ‘Number 51 (Madison)’, p. 319.

²⁷⁷ Bickel, pp. 18-19.

²⁷⁸ Murphy, p. 176.

²⁷⁹ Ibid.

²⁸⁰ Bruce Ackerman, *We the People, Volume 2: Transformations*, (Harvard University Press, 2000).

²⁸¹ Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review*, (Oxford University Press, USA, 2004), p. 91.

²⁸² Ibid.

Given twentieth century Bickelian debates on the countermajoritarian difficulty, it is easy to overlook the clear view during the American founding period that there needed to be a countermajoritarian institution as a check on odious state laws and to enforce rights provisions.²⁸³ Fundamental to the very idea of a written constitution and Bill of Rights was the non-mutability of certain principles. Jefferson was a key advocate²⁸⁴ for the adoption of the Bill of Rights, even while recognizing and approving of the key check it would give to the judiciary.²⁸⁵ In March 1789, at the time when Congress was convening for the first time, he wrote to Madison:

In the arguments in favour of a declaration of rights, you omit one which has great weight with me; the legal check which it puts into the hands of the judiciary. This is a body, which if rendered independent, and kept strictly to their own department merits great confidence.²⁸⁶

Still, for Madison, judicial review was a poor substitute for stopping poor legislation from being enacted in the first place. Originally he had sought to achieve the dominance of the centre over the states by establishing a veto power (or ‘negative’) which the federal government would have over all state laws. However, this proposal was defeated at the convention. The Bill of Rights now assumed much greater importance. Addressing Congress in June 1789 to introduce the proposal for a declaration of rights Madison said

If they are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.²⁸⁷

These relatively early views of Madison gradually embracing the principle of judicially enforced rights, with the judiciary functioning as a bulwark against extra-legal

²⁸³ In fact, the only clearly majoritarian institution in the federal government was the House of Representatives, and that was on the basis of a distinctly countermajoritarian franchise.

²⁸⁴ Jefferson urged the adoption of the Bill of Rights while minister in Paris, and persuaded Madison to support them. See Richard E. Labunski, *James Madison and The Struggle For The Bill of Rights*, (New York, N.Y. ; Oxford: Oxford University Press, 2006), p. 51.

²⁸⁵ Later, of course, Jefferson came to view the federal judiciary, headed by his cousin Chief Justice John Marshall, as a threat to republicanism.

²⁸⁶ Jefferson, Madison, and Smith, 'Letter From Jefferson to Madison, 15 March 1789'.

²⁸⁷ James Madison, 'House of Representatives, 8 June 1789', in *Rights*, (Chicago: University of Chicago Press, 1789). This was, of course, a good year after *Federalist* 51 had appeared.

accumulations of power, illustrate that the founders believed that neither a balance between social forces nor the enforcement of constitutional limits through politics would be sufficient to protect rights and hold those in power to account.²⁸⁸

Despite eulogising the proposed Constitution in his *Federalist* essays to ensure ratification, the eventual outcome of shared and divided sovereignty between the federal government and the individual states was one that profoundly dismayed Madison. He saw that the outcome at Philadelphia could be a recipe for conflict because of its generality and the way that the Constitution blurred the lines of sovereignty between the national and state governments and indirectly gave the states a key role in the federation through their power to appoint senators. Ultimately, Madison believed that the periphery had too much power over the centre and that the federal republic of the United States would dance to a tune set by the states. At this stage, Madison believed the generality of the Constitution could be a cause for problems. Later he came to see the ambiguity in the document was its great advantage. One reason that constitutionalism functions as a framework for constitutional renewal, and perhaps debate²⁸⁹, is the general nature of the compact agreed to originally. It provides vast space for citizens to live their lives, as Justice Stephen Breyer noted.²⁹⁰ However, as we shall see, this generality causes problems of its own. It is the implications of the relationship between the Court, the federal government and the people for the development of American constitutionalism that will be explored further in the next section.

4.3 The Supreme Court and Majoritarian Politics

In the key reapportionment case, *Baker v Carr*, Justice Tom Clark noted that the role of the Supreme Court as a defender of federal rights was anticipated as early as 1787.

As John Rutledge (later Chief Justice) said 175 years ago in the course of the Constitutional Convention, a chief function of the Court is to secure national rights.²⁹¹

²⁸⁸ Ely correctly notes that even in a system where a sufficient mass is able to exert an influence on representatives that does not provide for “the effective protection of minorities whose interests differ from the interests of most of the rest of us.” Ely, p. 78.

²⁸⁹ See *supra* note 200.

²⁹⁰ See *supra* note 198.

²⁹¹ *Baker v Carr*, p. 261.

However, for much of its history, even when it had the Fourteenth Amendment at its disposal, the Court chose to protect economic interests and private property rights rather than individual rights. In the section ahead I will address the Court's position within the national majoritarian system, and how some administrative changes in its docket in the mid-1920s gave it a unique vantage point from which to endorse changing policies such as the New Deal and, later, to anticipate and formalise emerging norms in society.

The immediate catalyst for footnote four of *Carolene Products* and the Court's change of emphasis was the appointment of two justices which put the normally dissenting Harlan Stone into the unusual position of being in the majority. This personnel shift was a return to business as usual in the sense that after an unusually long wait of four years to nominate his first justice, Roosevelt's New Deal policy agenda would no longer be at odds with the Court's decisions. As Robert Dahl noted in the 1950s, such personnel shifts and the obvious political orientation of most justices meant that "the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States."²⁹² The Court could on rare occasions block the application of a policy by up to 25 years. However, such outlier cases could not disguise the reality that "Congress and the president do generally succeed in overcoming a hostile court on major policy issues".²⁹³

The often close relationship between the federal courts and the federal government has been prominent in the work of Dahl and others.²⁹⁴ In his 1957 study of the Court's role as a policy-making institution, what was significant for Dahl was not that courts *made* policy, but the extent to which policy decisions were made "by going outside established 'legal' criteria found in precedent, statute, and constitution."²⁹⁵ Central to his enquiry was understanding the Court's role in either blocking the will of the ruling majority or lending legitimacy to it.²⁹⁶ The Court is not merely an agent of the governing alliance, wrote Dahl:

It is an essential part of the political leadership and possesses some bases of power of its own, the most important of which is the unique legitimacy attributed to its interpretations of the

²⁹² Robert A Dahl, 'Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker', *J. Pub. L.*, 6, (1957), 285.

²⁹³ *Ibid.* p. 288.

²⁹⁴ See for example *ibid*; Whittington, 'Political Supports'.

²⁹⁵ Dahl, 'Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker'. pp.279-280.

²⁹⁶ See for example Cover, 'The Supreme Court 1982 Term Foreword: Nomos and Narrative'.

Constitution. This legitimacy the Court jeopardizes if it flagrantly opposes the major policies of the dominant alliance.²⁹⁷

As the sentiment of the dominant national alliance shifted in response to political activity in society, so too did that of the Court.

From 1938 onwards the Court enunciated a changed conception of rights that placed more emphasis on the protection of federally protected rights, the rights of minorities, particularly their right to participate in the political process. During the Progressive era from the end of the nineteenth century to the 1930s, the Court dragged its feet while the democratic political institutions of the federal government and the states were passing legislation to ameliorate the conditions of workers and the urban poor. By the late 1930s it had begun to accept the changing political context, after which the gap between the Court's and the federal government's interpretation of the Constitution narrowed considerably. Two parallel trends emerge. As seen in Chapter 3, on the one hand, the Court's decisions have over time come to endorse, or 'formalise', values emerging from ongoing struggles within civil society. On the other hand, the Court became an agent of federal power almost by default. It was less a pro-active decision by any particular court or justices than it represented a correlation between the Court's commitment to uphold an emerging equality based conception of constitutional rights—which national majorities and the federal government had come to support *first*—and the greater propensity of the states to violate those rights.

Following the passage of the Judiciary Act of 1925²⁹⁸, the range and number of cases falling within the Court's obligatory appellate jurisdiction was dramatically reduced, giving the justices complete discretion to hear cases, most of which would henceforth come by way of petitions for *certiorari*²⁹⁹. This ostensibly simple administrative change had a profound impact on how the Court perceived its emerging role. It was now no longer responsible for correcting 'errors' in the decisions of the lower federal courts. The Court's "primary responsibility now was to focus on those cases which presented issues of general importance — those which 'transcended' the

²⁹⁷ Dahl, 'Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker'. p.293.

²⁹⁸ Often dubbed 'The Judges' Bill', The Act was a response by Congress to appeals from the justices including Chief Justice Taft for changes to the appeals process because the Court could no longer keep up with its docket. See Grossman and Epp, pp. 109-10.

²⁹⁹ From law latin, meaning "to be more fully informed", *certiorari* is the writ used by the Supreme Court to review a lower court's judgment.

²⁹⁹ Grossman and Epp, p. 110.

interests of the parties to the case.”³⁰⁰ According to Grossman and Epp, this enhanced control over the cases that it heard resulted in a “much broadened judicial vision” and a radically changed agenda “responsive to emerging theories of ‘rights consciousness’ and expectations of legal redress.”³⁰¹

The Court’s new control over its docket combined with its vantage point in the American system of government put it in a strong position to formalise emerging norms, and to recognise the expanded scope of norms, which is evident in the handling of the reapportionment cases in Chapter 5. Neither the Court’s decision in *Carolene* nor its later decisions in *Brown v Board of Education* or the reapportionment cases were ones where it was imposing its will on a reluctant population as the countermajoritarian difficulty would imply. Indeed, the complaint could be made that given the Court’s role, as Dahl saw it, as part of the ruling coalition, that it has sometimes been overly conscious of what national majority sentiment would tolerate. The sense that the Court does not stick its neck out before there is already a groundswell of national opinion on a given issue fits the Tocquevillean conception of opinion formation in the United States.³⁰² As Klarman puts it:

The Court identifies and protects minority rights only when a majority or near majority of the community has come to deem those rights worth of protection.³⁰³

The role of the Supreme Court is thus very much that of a passive arbiter that does not create values but which must sometimes decide between conflicting constitutional values arising from already significant social issues.³⁰⁴ To this extent, it has been said that the Court has “seldom lagged far behind or forged far ahead of America.”³⁰⁵ This certainly represents a reasonable assessment of the Warren Court, which sometimes got ahead of the political branches on issues like desegregation and reapportionment, but was largely in step with the emerging value orientations of civil society on those issues.

³⁰⁰ Ibid.

³⁰¹ Ibid.

³⁰² See *infra* note 491.

³⁰³ Michael J Klarman, 'Rethinking The Civil Rights and Civil Liberties Revolutions', *Virginia Law Review*, (1996). pp.17-18.

³⁰⁴ See for example Cover, 'The Supreme Court 1982 Term Foreword: Nomos and Narrative'.

³⁰⁵ Robert G McCloskey and Sanford Levinson, *The American Supreme Court*, Sixth edn (University of Chicago Press, 2016), p. 292.

One example is the Court's evolving interpretation of equality and human dignity. For example, Maxine Goodman notes that in *Brown v Board of Education* the Court cited the Swedish sociologist Gunnar Myrdal³⁰⁶, who had defined the American Creed as including dignity as an essential ideal.³⁰⁷ The Court used Myrdal's work as authority for the idea that segregation negatively impacts African-American school children. Perhaps just as significantly, in *Trop v Dulles* the Court recognised that any conception of the Eighth Amendment's prohibition on cruel and unusual punishment must recognise an evolving conception of human decency.³⁰⁸ The irony of the Court citing a Swedish study to illustrate that dignity was an essential American ideal does not diminish the important role of the Court in 'solidifying constitutionalism' and its values, to paraphrase Murphy³⁰⁹.

Though the Court's role as a legal check on dangerous local majority sentiment became increasingly important as its authority and prestige grew, its writ was still primarily felt in the legal / institutional space. It could support and encourage political action in the civic space where the underlying values were aligned with its priorities and national ones. As indicated in previous chapters, however, the Court's ability to shape the value orientations of the civic space in former slave states, or those of certain other local majorities remained limited.

4.4 A Janus Faced Constitution

In the United States, the Böckenförde dilemma also has relevance. Here it was solved partly through the emerging national ideology, and partly through the plethora of voluntary associations which through the nineteenth century allowed community, civic, and religious loyalties to sustain themselves in parallel but not in opposition to American identity. The very liberty guaranteed by the Constitution also sustained these voluntary associations. However, the strength of these local bonds has weakened over time, particularly as church attendance has declined.

Jefferson's belief in constitutional renewal left a powerful resonance in American political thought. It is of a country which commits itself to a set of precepts on parchment, but which has had to constantly fight and struggle over the meaning and

³⁰⁶ Myrdal.

³⁰⁷ Maxine Goodman, 'Human Dignity in Supreme Court Constitutional Jurisprudence', *Nebraska Law Review*, 84, (2006), 745.

³⁰⁸ *Trop v Dulles*, 356 U.S. 86 (1958). "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.[...] The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

³⁰⁹ See *supra* note 257.

implications of those ideas. This point is put most strikingly by Walton Hamilton who writes

The Bible of verbal inspiration begat the constitution of unquestioned authority. [...] As the Bible wanted exegesis, the constitution demanded exposition. Its catholic clauses yielded to deduction precepts suitable to the cause and the occasion; it became the great storehouse of verbal conflict, and rival truths were derived by the same inexorable logic from the same infallible source. The Civil War was waged for a Union which it had created; the object of secession was to secure rights guaranteed by the constitution.³¹⁰

At the basis of interpretation, then, is not merely the possibility, but the *probability*, of conflict over meaning and values.³¹¹ Given such a range of diametrically opposing interpretations in American history from one relatively short text, one can perhaps forgive the Supreme Court for not always getting it right. Constitutionalism therefore requires not only the enunciation of certain values such as equality and human dignity, but also a reinterpretation of the scope, potential and applicability of those values over time. That progress is also dependent on the stability of a country's constitutional and institutional culture.

One paradox with the malapportionment cases examined in the next chapter was that the crisis for representative democracy did not arise because state legislators were acting in *conformity* with constitutionalism, but because they were manifestly acting in *opposition* to it. By ignoring the equal protection principle of the federal constitution and contravening the terms of their own state constitutions requiring decennial reapportionment, the majorities in all but a handful of state legislatures had been elected by only a minority of the state's population.³¹² While this could easily be dismissed as purely a desire to hang onto political power—and it was certainly that—malapportionment also reflected deeper value schisms. Each malapportioned state was itself split into different value systems. In northern states, the divide was principally between urban and rural, and between the wealthy white business class and urban poor. In the South, segregation added a particular hue to these competing values systems. The urban / rural split was replicated across the country: between poorer urban and blue

³¹⁰ Walton H. Hamilton, 'Constitutionalism', in *Encyclopaedia of The Social Sciences*, ed. by Edwin R. A. Seligman and Alvin Johnson (New York: Macmillan, 1930). p.256.

³¹¹ This is also a theme in the work of Robert Cover. See Cover, 'The Supreme Court 1982 Term Foreword: Nomos and Narrative'.

³¹² See *infra* note 390.

collar workers demanding better conditions, and those in rural areas seeing threats to their liberties and rights from numerically equal districting.³¹³ Of course, the constitutional rights and liberties which wealthy white rural populations invoked as a reason for not reapportioning were found in the same constitutions whose decennial reapportionment requirements they were ignoring.

Only a system of government based on general principles could bridge the divide between the groups assembled at Philadelphia in 1787. Such principles had to be flexible enough to mean one thing to defenders of states' rights and something quite different to those favouring energetic national government. Justice Holmes' dissent in *Lochner* that a constitution "is made for people of fundamentally different views"³¹⁴ was a message to his colleagues on the majority that attempts to straightjacket the country into a plutocratic reading of the Fourteenth Amendment ignored what constitutions are about. A constitution can be seen as much as a tool for mediating disagreement politically as a final and definitive instrument of governance. This is partly why claims about identifying original intent are problematic if a constitution is a compromise between different groups or interests within thirteen sovereign states. Yet as a legal tool, the constitution has to represent the final word of authority, even if it cannot be the final word in interpretation or meaning. Since a constitution acts as both the source of ultimate authority and is also a general instrument of law and governance, this means that its authority may greatly exceed its capacity to provide definitive answers. In other words, constitutions have authority precisely because they are general enough to unite an otherwise disaggregated people around a set of political and societal principles.

Justice Robert Jackson argued that the judicial burden involves "translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century."³¹⁵ Brenner's point that "only a fragmentary constitution is unstrained, only it can permit a constitutional consensus over the long run"³¹⁶ is relevant here. Such a constitution permits the courts to interpret flexibly to meet the changing needs of a society and reconcile conflicts which could not have been

³¹³ See *supra* note 112.

³¹⁴ *Lochner*, p. 76.

³¹⁵ *Barnette*, p. 639.

³¹⁶ Brenner, p. 136.

foreseen by the constitutional enactors.³¹⁷ This flexibility was just as well with slavery being the elephant in the room for the first eight decades of America's existence.

Without that generality (and flexibility) in the constitutional text—which still, astonishingly, has the force to unite Americans of such disparate political persuasions as can be found in red states and blue states—it seems unlikely that the U.S. would have even made it intact to fight the Civil War, let alone survived it. In the post-Civil War period, constitutional amendments and Reconstruction ostensibly entrenched the logic and value of equality in the constitutional text. However, this was a victory in the legal / institutional space; it was not a decisive victory in the 'local' civic space in the former slave states. The emancipated African Americans living in the former slave states were still not accepted as citizens in those places, because the value system in the South rejected the constitutional values which triumphed at the end of the Civil War.

The Supreme Court's part in incorporating the protections of the Fourteenth Amendment against the states would be crushingly slow for the emancipation of African Americans and other minority groups, as the Court turned towards the protection of economic rights. This reflects and reinforces the point made in Chapter 1 that the development of American democracy and the expanding suffrage have paralleled, and also driven, the expansion of rights.³¹⁸ This is perhaps what Robert Bellah meant when he called slavery "the second time of trial".³¹⁹ Slavery was, said Bellah "the most salient aspect of the more general problem of the full institutionalisation of democracy within our country."³²⁰ How and why the incorporation of the Bill of Rights, and democracy itself, eventually made headway is the question we now turn to.

4.5 Incorporation of the Bill of Rights

By the 1920s the U.S. was still grappling with the thorny question of how, and to what extent, the Bill of Rights of 1791 would be incorporated within the scope of the Equal Protection and Due Process clauses of the Fourteenth Amendment (1868). Incorporation represented a significant evolution in American constitutional jurisprudence towards the

³¹⁷ The generalities in the text may create or perpetuate debate, arguments and conflict, but can also provide a basis for consensus.

³¹⁸ In post 1949 Germany, by contrast, rights have been seen as a precondition of democracy.

³¹⁹ Bellah, p. 182.

³²⁰ Ibid.

idea that the Bill of Rights protected individuals as much against abuses of power by their own states as by the federal government.³²¹

The Fourteenth Amendment is by some margin the Constitution's most litigated provision. Although passed in 1868 as the United States pushed ahead with Reconstruction, its impact did not really begin to be felt until the 1920s—and only then just barely—when the Supreme Court began to hold that its Due Process and Equal Protection clauses applied to the states.³²² The evolution of American constitutionalism from a charter of enumerated powers designed to limit government to a value centric orientation focussed on protecting individual rights parallels the incorporation of the Bill of Rights against the states. Whittington observes that the states have occupied far more of the Supreme Court's constitutional attention than has the federal government, and the states have been the main target of the power of judicial review.³²³ This is both because of the Court's role as an agent of national policy since the first decades of the republic³²⁴ and the frequent violations of federally protected rights by the states. It is this second point I wish to concentrate on.

The Bill of Rights was ostensibly thought to be a defence of the people against federal power. By the twentieth century it was becoming abundantly clear that they needed to be protected from their own states.³²⁵ The Fourteenth Amendment contains within it the simple idea that neither federal nor state laws may negate or diminish the constitutional rights of citizens of the United States. The amendment contains five sections but it is Section 1 which provides some of the Constitution's most significant constitutional rights guarantees, which also makes it the section about which the vast majority of Supreme Court cases are fought over.³²⁶ Still, even as the power of the federal government increased after the Civil War, the innately conservative federal judiciary did not rush to incorporate the protections of the Fourteenth and Fifteenth Amendments against the states. By the beginning of the New Deal period (c.1933) there

³²¹ For more on incorporation see Akhil Reed Amar, 'The Bill of Rights and The Fourteenth Amendment', *Yale Law Journal*, (1992).

³²² Most but not all of the provisions of the Bill of Rights were applied to the states but not until the 1960s. See Grossman and Epp, p. 107.

³²³ Whittington, 'Political Supports', p. 586.

³²⁴ See Dahl, 'Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker'; Whittington, 'Political Supports'.

³²⁵ See *infra* note 331.

³²⁶ The key part of Section 1 relevant to most cases and particularly *Baker v Carr* reads: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

were as yet few cases dealing with civil liberties, and the constitutional concept of equality in the Equal Protection Clause was generally underdeveloped and “offered little protection against discrimination”.³²⁷ In Justice Holmes’s view, the Clause was the “last resort of bad constitutional arguments”.³²⁸ Even after over 160 years of interpreting the Constitution, the U.S. Supreme Court in the 1950s and 1960s had only been dealing with the incorporation of the Bill of Rights against the states for a few decades.³²⁹

By the 1960s, the expansion of the suffrage to women was no more than two generations old, but the fulfilment of its extension to African Americans promised in the post-Civil War amendments was woefully incomplete. After *Brown v Board of Education*, many lawyers felt that the emancipatory promise of the Fourteenth Amendment was finally being fulfilled almost ninety years after its adoption. In decisions such as *Brown*, and other cases³³⁰ in the 1950s and 60s that flowed from it, the Supreme Court found itself engaged in what might be called the second great period of reconstruction.³³¹ Lending credence to the idea of the judiciary as a bulwark against ossification, Martin Shapiro observes that “[the Court] rather than the congress or presidency has been the principal agent of domestic reform in post-World War II American politics.”³³² One explanation for this was the recognition by many American politicians, lawyers and judges that while slavery had been abolished after the Civil War, many of the states were still a regressive and anti-liberal force within the country. To such lawyers, state governments were “the quintessential threat to individual and minority rights”, while federal officials, particularly federal courts, were the special guardians of the rights promised in the Fourteenth Amendment.³³³ The idea that the biggest threat to liberty and the Union came from the states rather than the federal government was by no means novel. In 1913, Justice Oliver Wendell Holmes Jr observed:

I do not think the United States would come to an end if we lost
our power to declare an Act of Congress void. I do think the Union

³²⁷ Grossman and Epp, pp. 107-08.

³²⁸ Ibid. p. 108.

³²⁹ For example, before 1925 the Supreme Court did not apply the First Amendment to the states. See Morton J Horwitz, 'In Memoriam: William J. Brennan, Jr', *Harvard Law Review*, (1997), 27.

³³⁰ See for example, *Gomillion v Lightfoot*, 364 U.S. 339 (1960).

³³¹ See for example Akhil Reed Amar, 'The Bill of Rights as a Constitution', *Yale Law Journal*, (1991), 1133.

³³² Martin Shapiro, 'Foreword', in *The Modern Supreme Court*, ed. by Robert Green McCloskey (Cambridge, Mass: Harvard University Press, 1972), p. v.

³³³ Amar, 'The Bill of Rights as a Constitution', p. 1133.

would be imperiled if we could not make that declaration as to the laws of the several States.³³⁴

Holmes was, in fact, merely restating what had been a perennial fear of the founders, particularly Jefferson and Madison that the threat to minority interests came from the states and not the incipient federal government. One ironic caveat was that due to the widespread practice of reapportionment, one minority that the states were sublime at protecting was the white rural minority.

The Reconstruction Period after the Civil War created a constitutional and societal architecture which was closer to the twentieth century than to the eighteenth century. However, it took almost a century for some of the promises of the Fourteenth and Fifteenth Amendments to be realised. The catalyst for this much delayed recognition of basic rights was not the civil rights movements of the 1950s and 1960s, but the social and economic crisis of the Great Depression, and a quiet revolution in the Supreme Court's jurisprudence. Out of the defeat of Roosevelt's court packing plan and the Court's belated approval of the hitherto blocked legislation came a new jurisprudence which would take the constitutionality of economic statutes almost as axiomatic, while declaring that legislation which curtails the processes that protect minorities and political participation would be subject to stricter judicial scrutiny.

4.6 Footnote Four and the Rise of the Individual

4.6.1 Case overview – United States v Carolene Products

United States v Carolene Products was a generally mundane case relating to the shipping of milk products across state lines. However, it contains what is regarded as the most famous footnote in Supreme Court history. A 1923 act had banned the interstate shipment of 'filled' milk products (with skimmed milk and vegetable oil added). A manufacturer indicted for shipping filled milk challenged the statute. At issue was whether the statute violated the Commerce Power granted to Congress and the Due Process Clause of the Fifth Amendment. Since the late nineteenth century such cases had normally been decided in favour of the business interest concerned, with the offending statute being struck down. *Carolene* marked a turning point, signifying a shift on the Court from its decades old defence of business interests dating from the *Lochner* era which had blocked

³³⁴ Oliver Wendell Holmes, 'Speech at a Dinner of the Harvard Law School Association of New York, 15 Feb 1913', in *The Collected Legal Papers*, (New York: Dover Publications, 2007), pp. 295-96.

progressive legislation. Footnote four, written by, the then, Associate Justice Harlan Stone, signalled that the Court would presume the constitutionality of economic legislation, but would undertake more searching judicial scrutiny with legislation that was prohibited by the Bill of Rights, which affected access to political processes, or which targeted minorities.

During the period when the intellectual debate about the nature of judicial review began to gain ground in the 1950s, the U.S. and its allies had just successfully fought fascism in Europe. Many liberal academics who agreed with the leftward policy shift on the Supreme Court following the multiple appointments made by Roosevelt felt a particular intellectual need to find a justification for judicial review given their opposition to it during the Progressive Era. There was moreover an intellectual need “to imagine a counter-majoritarian Court, even if one did not exist.” Beyond the academy, “for a public that had seen the ugly face of totalitarianism” there was, notes Friedman, “broad support for an institution in a democracy dedicated to protecting minority rights.”³³⁵

By the end of World War Two, humanity had “learned some indelible lessons about the need to find effective constraints for governmental abuse of power.”³³⁶ Despite the risks of government by judges, writes Durham, the post-World War Two era “witnessed a pronounced convergence towards reliance on ‘the least dangerous branch’³³⁷ to control such abuses through judicial review.”³³⁸ Although America had no Holocaust, it had, observes Durham, “a history of racism that courts began to dismantle at the beginning of the 1950s.”³³⁹ The roots of that process to dismantle racism can be traced to footnote four. Robert Cover refers to the footnote as “the text” for the generation of *Brown v Board of Education* and the civil rights movement.³⁴⁰ The greater willingness of the Supreme Court to intervene on behalf of representative democracy and the individual in the 1960s has its origins in the New Deal period. Roosevelt strongly promoted the idea of a second Bill of Rights that would include a duty to

³³⁵ Friedman, 'Countermajoritarian Difficulty Part Five', p. 161.

³³⁶ Durham, p. 43.

³³⁷ As Hamilton notably put it in *Federalist* 78.

³³⁸ Durham, p. 43.

³³⁹ Ibid. p. 44.

³⁴⁰ Robert M Cover, 'The Origins of Judicial Activism in The Protection of Minorities', *The Yale Law Journal*, 91, (1982), 1316.

provide for 'welfare rights'.³⁴¹ The reapportionment decisions, which were concerned with restoring the integrity of democratic representation, can be seen through the prism of footnote four's statement of the conditions under which the Court would undertake judicial review and intervene in democratic processes.³⁴²

The emphasis on group affiliations had remained dominant in the U.S. since the Civil war. This suited the idea of a country where majority rule prevailed, but it seemed ill-suited to changes in society wrought by industrialisation and the migration of huge numbers to the cities. Bobbitt notes that changes were also afoot within American law that would move its orientation away from the interests of groups to a greater focus on the individual.³⁴³ This transition had more significant implications though since the greater focus on the individual implied a weakening of the communal bonds, associational activities, and political activity of the civic space through which rights had previously been realised. By the 1930s, economic crisis meant that the old order would no longer hold. Franklin Roosevelt's New Deal programme sought to provide for a new and invigorated relationship between the federal government and 'the people', but it was one that the Supreme Court was initially resistant to.

David Strauss argues that footnote four was "the Court's first—and maybe only—attempt to say, systematically, when the courts should declare laws unconstitutional."³⁴⁴ Although footnote four signalled a retreat from judicial review of economic regulations and suggested a general inclination towards judicial inertia, it also gave notice that the Court would take a keener interest in cases where federal rights, rights of political participation, or the rights of certain minorities were under threat. *Carolene* served to enshrine the incorporation process within a formula, which while not universally admired, provided some evidence of a logical framework for the use of judicial review rather than the arbitrariness of discretion. *Carolene* can be seen as a clear statement of judicial deference to majority rule, but it was one which came with a significant caveat: the circumstances under which the Court would act to protect

³⁴¹ Robin West, 'Ennobling Politics', in *Law and Democracy in The Empire of Force*, ed. by James Boyd White and Jefferson Powell (Ann Arbor: University of Michigan Press, 2009), p. 66.

³⁴² *United States v Carolene Products*.

³⁴³ Philip Bobbitt, 'The Age of Consent', in *The Ages of American Law*, ed. by Grant Gilmore and Philip Bobbitt (Yale University Press, 2015), p. 125.

³⁴⁴ David A Strauss, 'Is Carolene Products Obsolete', *U. Ill. L. Rev.*, (2010), 1254.

individual rights against the will of the majority were made clearer than they had ever been before, or perhaps, since.³⁴⁵

However, this change in the Court's jurisprudence and the influence of footnote four on subsequent decisions of the Stone, Vinson, and Warren Courts cannot be divorced from the changing political context of the time. In 1937-38, that context was "the New Deal at home and totalitarianism abroad".³⁴⁶ The Court was, thus, announcing its intention to withdraw almost totally from its decades-long oversight of economic regulations which had culminated in the confrontation with Franklin Roosevelt. Yet this withdrawal did not mean that "in the age of Hitler, majoritarianism itself would not require more in the way of justification than its professedly democratic nature".³⁴⁷ Assessing the degree to which global events, particularly in Europe, were influencing the thinking of the justices and the direction of the Court is particularly difficult. However, the day after the decision in *Carolene Products*, Stone wrote in a letter to Judge Irving Lehman:

I have been deeply concerned about the increasing racial and religious intolerance which seems to bedevil the world, and which I greatly fear may be augmented in this country. For that reason I was greatly disturbed by the attacks on the Court and the Constitution last year, for one consequence of the program of 'judicial reform' might well result in breaking down the guaranties of individual liberty.³⁴⁸

Stone's connection between fascism in Europe and Roosevelt's court packing plan highlight his concerns over how easily state power can overcome legal restrictions on government and erode civil liberties.

Stone signalled in footnote four that civil liberties would still be subject to judicial protection when specific wires were tripped. These tripwires—one for each paragraph—can be summarised as 'federal rights', 'political participation', and 'representation'. Secondly, it established a principle of closer judicial scrutiny for the protection of the rights of "discrete and insular minorities".³⁴⁹ Third, it articulated a principle which linked the proper functioning of political processes with a system that protected minority rights. Provided the political processes are working normally and are

³⁴⁵ Cover, 'The Origins of Judicial Activism in The Protection of Minorities', p. 1316.

³⁴⁶ Ibid. p. 1289.

³⁴⁷ Ibid.

³⁴⁸ Alpheus Thomas Mason, *Harlan Fiske Stone : Pillar of the Law*, (New York: Viking, 1956), p. 515.

³⁴⁹ *Carolene Products*.

not excluding any groups then the courts will not normally intervene. Particularly relevant to the reapportionment decisions is the second paragraph of footnote four since it links the legitimacy of democratic processes with the ability of citizens to participate fully in the political processes without hindrance from their elected representatives.

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.³⁵⁰

Footnote four created a legitimacy test for legislative action against which civil liberties claims could be measured. Taking each paragraph in turn, legislative actions attracting judicial scrutiny might be 1) ones prohibited by the Bill of Rights as incorporated by the Fourteenth Amendment; 2) ones which disadvantage citizens generally by restricting their participation to the political process, or which sabotage the process by prioritising the interests of certain groups or legislators themselves; and 3) ones which discriminate against specific minorities, thereby damaging the political processes which protect them and the quality of their representation within those processes. Cover writes that the scope for extending judicial review is determined not by “the special value of certain rights” but by “their vulnerability to perversions by the majoritarian process.”³⁵¹

The paradox in the reapportionment cases was that while they were ostensibly a problem of illegitimate minority rule as a result of decades old malapportionment, they were fundamentally about the denial of individual rights to the majority of the population located in urban and suburban areas. So while ‘the minority’ was in charge of state legislatures, many of the groups which constituted the numerical majority were the very minorities that footnote four alluded to: African Americans, Catholics, Jews, immigrants, and other minority groups.

Due to changes in personnel on the Court in the 1940s a period of intense judicial deference to federal and state legislatures began, but there were exceptions such as *West Virginia v Barnette* which illustrated the influence of *Carolene*.³⁵² Eventually, the deference to majorities went too far, with a divided court led by Justice Felix

³⁵⁰ Ibid. p. 155.

³⁵¹ Cover, 'The Origins of Judicial Activism in The Protection of Minorities', pp. 1291-92.

³⁵² See *supra* note 252.

Frankfurter upholding many McCarthyite anti-civil liberties laws in the 1950s.³⁵³ However, three appointments to the Court in the 1950s by Dwight Eisenhower—Earl Warren, William Brennan and Potter Stewart—laid the basis for *Baker v Carr* and the other reapportionment decisions.

4.7 Conclusion

A renewal oriented development in constitutional values can be seen in the evolving understanding of equality and human dignity represented by the incorporation of the Bill of Rights against the states, the expanding franchise, and the important consequences of the Court's changed jurisprudence after its decision in *Carolene Products*. Characterising the Court's shift from its pre-New Deal jurisprudence to its post-footnote four orientation, Lietzmann argues that after it lost the economic fight with Franklin Roosevelt over the New Deal, the Supreme Court "withdrew to the sidelines of political morality".³⁵⁴ In other words, as represented in *Carolene Products* footnote four.

I would rather characterise this, though, as an emerging national liberal morality, based on the constitutional development of equality highlighted above. It was, though, one that drew particular political sustenance from urban, suburban and northern parts of the U.S., rather than either rural areas, the American heartland, or the South. The second paragraph of footnote four, which provided a judicial standard for stricter scrutiny of cases involving the functioning of the political process and its ability to provide relief from undesirable legislation, anticipated precisely the sort of problem presented by the reapportionment cases. James Madison believed that the multiplicity of interests in a continent sized republic would make it more difficult for tyrannical factions to form as they could at the local level. Although Madison was partially correct, as we shall see in Chapter 5, the intractable difficulty with malapportionment was that electoral districting at the state and federal level was still run by the states and the state legislatures refused to reapportion. Civil society groups such as the League of Women Voters were hugely important in highlighting the issue of malapportionment with the public, but their efforts to shame legislators into reapportioning and so solve the issue politically ran into legislative roadblocks. Resolving the problem would eventually require the intervention of the federal courts. The reapportionment decisions were ones which brought the

³⁵³ See Morton Horwitz who noted that "under Justice Frankfurter's influence, the Court had rubber-stamped a wide variety of repressive McCarthyite laws." Horwitz, 'In Memoriam: William J. Brennan, Jr', p. 26.

³⁵⁴ Lietzmann, p. 94.

constitutional order back into alignment with majority sentiment and, as Barry Friedman argues, anticipated changes in public opinion.³⁵⁵ The reapportionment cases were different and more significant in the legal / institutional space because they altered the political system through which policies are made.

What were the factors that brought the Court to pronounce on the proper form of representative government in the United States, and what longer term developments in American constitutionalism led to this significant political transformation? This question will be considered in the next chapter.

³⁵⁵ See *supra* note 264.

Chapter 5 - A Changing Concept of Equality

In the last analysis there is something compelling about an institution that can say with authority that the south may not preserve slavery any longer, that one man's vote is not to be worth seventeen times that of another, that the police too must obey the law, that the poor and ignorant are entitled to the same legal protection as the rich and educated, that one man may not tell another man what he may not read or what he must pray.³⁵⁶
(Martin Shapiro)

Our constitutional system amply provides for the protection of minorities by means other than giving them majority control of state legislatures. (Chief Justice Earl Warren)³⁵⁷

³⁵⁶ Shapiro, p. vi.

³⁵⁷ *Reynolds*, p. 566.

Held: The right of suffrage is denied by debasement or dilution of a citizen's vote in a state or federal election. [...] The seats in both houses of a bicameral legislature must under the Equal Protection Clause be apportioned substantially on a population basis.³⁵⁸ (Majority Opinion, Chief Justice Earl Warren)

With these words, the Supreme Court launched a constitutional and political revolution in the United States. The widespread practice of malapportionment in almost³⁵⁹ every state in the Union effectively represented a decades old counter-majoritarian power grab at the heart of American constitutional government by pro-segregationists in the South, and wealthy rural and business interests across the country. The abuse of civil and democratic rights in state legislatures which had endured intermittently since America's founding provided the political imperative and moral impetus for the stronger judicial defence of representative democracy which was seen in the reapportionment cases. However, in the United States this scrutiny took the form of intense corrective intervention over a period of three years rather than the more permanent role of the *Bundesverfassungsgericht* in Germany.

As seen in previous chapters the division between the civic space and legal / institutional space was a significant factor in how the reapportionment cases reached the Court and were eventually dealt with. Civil society actors played an important role in bringing the problem of malapportionment to the public's attention. The reapportionment cases brought into sharp relief the issues addressed in previous chapters, particular the growing schism between constitutional values as enunciated by the Supreme Court which matched national majority sentiment, and the competing value systems and interpretations of local majorities who were refusing to reapportion. What the reapportionment cases examined in this chapter illustrate is that even in the absence of an agreement on values, or even if the dogged and persistent activity of civil society actors does not succeed in persuading legislators to reapportion, there must as a last resort be an institution with the authority to compel them to do so.

Malapportionment illustrated the extent to which the preservation of human dignity relies on functional representative democracy, and ultimately relies, as the Supreme Court cases showed, on constitutionalism itself. By leaping into the

³⁵⁸ Ibid.

³⁵⁹ Massachusetts was one of the most equitably apportioned states in the Union, even before the Court's reapportionment rulings. See Smith, p. 15.

“mathematical quagmire” of reapportionment which Justice Felix Frankfurter’s dissent in *Baker v Carr*³⁶⁰ warned about, the Court found itself eventually having to decide upon the fundamental principle of American representative government in the United States; one which was based on the clear idea of majority rule, or one which took geographic, historical or community factors into account. In its decision, firstly, to enter the reapportionment fray and then, secondly, to enunciate a constitutional principle for the standard of representative government, the Court located the equality principle for one person one vote ostensibly through reference to the Equal Protection Clause of the Fourteenth Amendment. However, the one person one vote decision was ultimately explained through the Court taking an expansive narrative view of the country’s constitutional development, which recognised the changed conception of equality as a result of social struggles, the expanding franchise and successive constitutional amendments. Since the Constitution did not specify a form of republican government, the idea that it had to be based on equal representation was certainly not self-evident. As Bruce Terris, an assistant to the Solicitor General noted, this development towards a one person one vote standard was inevitable seen in the light of the steadily expanding franchise.³⁶¹

Baker highlighted not just the general question of the permissibility of judicial review in a democratic society as more mundane cases have. It also raised questions of fundamental constitutional importance such as the nature of republican government, the separation of powers, and the tension between state sovereignty and the rights of United States citizens, all of which were understood and deliberated upon by the justices in *Baker*. The reapportionment cases illustrate the stability versus renewal paradigm of constitutionalism addressed in previous chapters in the form of a complex political and legal dilemma. Due to the somewhat limited parameters of this project my focus will be on the development in the Court’s reasoning from its initial ruling in *Baker v Carr* which avoided pronouncing on principle to the later rulings which declared equality to be the standard of representation in the United States.

In what follows I will firstly explain how malapportionment entrenched political ossification and minority rule in most of the state legislatures in the Union, before addressing the Supreme Court’s dilemma over whether to wade into Justice Felix Frankfurter’s “political thicket”, as civil society and (some) political actors were urging

³⁶⁰ *Baker v Carr*.

³⁶¹ See *infra* note 447.

the justices to. As addressed in Chapter 3, what we can observe in the reapportionment cases is the Court responding to the demands of civil society by formalising an understanding of equality—one person one vote—that polling after the decisions showed a large majority of Americans approved of.³⁶² The evidence from the reapportionment cases indicates a Supreme Court formalising value changes that are already occurring in civil society. The chapter then proceeds to assess the Supreme Court's shift from a standard of republican government that merely avoids arbitrariness in *Baker v Carr* to its eventual destination of 'one person one vote' in *Reynolds v Sims*. This shift can be understood through the overall paradigm of renewal, reflecting a changing conception of political equality and individual dignity within American society as a result of struggles between civil society actors, entrenched local majority interests, and national political institutions. Overall, this evolution in jurisprudence seen in the reapportionment opinions of Justice Douglas in *Gray v Sanders* and Chief Justice Warren in *Reynold v Sims* reflected, and indeed paralleled, fundamental struggles between different interests, regions, and groups in American history, and the progressive social, economic and political developments which arose as a result.³⁶³ Although this shift towards human dignity and political equality mirrored some constitutional developments in Europe as a result of the increased focus on human rights after World War Two, it was predominantly based on the uniquely American factors of the Incorporation of the Bill of Rights and *Carolene Products* footnote four addressed in the last chapter.³⁶⁴ To conclude, the chapter assesses the success and permanence of the Supreme Court's restoration of majority rule and individual rights in the reapportionment cases, amid the continued problem of gerrymandering.

The reapportionment decisions had a dramatic political effect at the time forcing almost every state legislature to reapportion. However, the decisions did not affect the underlying values differences between the urban and rural areas, and so can perhaps only be described as a partial success. Some of the gains of the reapportionment decisions were lost within twenty years due to the upsurge in gerrymandering, which was now the only legal form of malapportionment now that its 'numerical' sibling had been outlawed. Overall, the reapportionment decisions reveal the limitations of the Supreme Court in being able to influence the overall quality of the civic space and the

³⁶² See *infra* note 470.

³⁶³ See *supra* note 134.

³⁶⁴ As seen, however, at the time of writing his opinion in 1938, Stone was not oblivious to events outside the United States. See *supra* note 348.

processes of American representative democracy as the *Bundesverfassungsgericht* is able to do in the German system. The decisions stand as a remarkable testament to the progressive role that courts can have in a country committed to the idea of government under law. Yet they also illustrate that such progress may be limited if it is not embraced in the civic space as well.

5.1 Overview

5.1.1 Case overview *Baker v Carr* and *Reynolds v Sims*

*Baker v Carr*³⁶⁵ arose from a federal court action filed against the State of Tennessee by a number of officials from across the state on behalf of qualified voters in under-represented areas. Charles W Baker was one of a large number of people who joined the suit, but who otherwise played virtually no part in the proceedings. The attorneys for Baker et al sued Joe Carr, the secretary of state, whose role involved overseeing the State's election processes. The case against Tennessee hinged on the refusal of legislatures since the turn of the century to meet their constitutional duty to reapportion. The attorneys sought to show that this failure to reapportion constituted a violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and that the maldistribution of state revenues arising out of the malapportionment demonstrated a pattern of discrimination against urban voters. The case was dismissed by the three judge district federal court, who noted that the state legislature was "guilty of a clear violation of the state constitution", but that on the basis of the precedent set by *Colegrove v Green*³⁶⁶—in which Justice Felix Frankfurter wrote the majority opinion— the remedy did not lie with the courts. The case was then appealed directly to the Supreme Court.³⁶⁷

*Reynolds v Sims*³⁶⁸ was one of dozens of lawsuits initiated after the Supreme Court's decision in *Baker* that malapportionment was a justiciable issue. Owen Sims, a voter in Alabama was selected as the lead plaintiff in a suit requesting that the federal district court declare all legislative districts in Alabama null and void, and order that the primary and general elections for 1962

³⁶⁵ *Baker v Carr*.

³⁶⁶ *Colegrove v Green* 328 US 549 (1946).

³⁶⁷ See Smith, pp. 57-67.

³⁶⁸ *Reynolds*.

be fought on an 'at-large' basis.³⁶⁹ On July 21 1962, the three judge district court unanimously declared Alabama's system of apportionment a violation of the Equal Protection Clause of the Fourteenth Amendment. The Court increased the representation of underrepresented urban counties, changing Jefferson County's delegation from seven to seventeen and Mobile County's from three to eight.³⁷⁰ The hope of the district court was that this change would break the strangle-hold of the rural legislators on the legislature allowing a more comprehensive reapportionment plan to take shape. Bernard Reynolds, a probate judge in Dallas County, an overwhelmingly white rural county that feared being lumped into a district with Lowndes County and its overwhelming African American majority filed an appeal against the district court's ruling with the U.S. Supreme Court, with the case being heard as *Reynolds v Sims*.³⁷¹ The eventual 8-1 decision in *Reynolds* declared one person one vote to be the required standard of apportionment in the United States, based on the principle of numerically equal districts.

Asked after his retirement what the most significant cases had been during his fifteen years on the Supreme Court, Chief Justice Earl Warren identified the legislative reapportionment cases, *Baker v Carr*, *Reynolds v Sims*, and a number of parallel cases.³⁷² Given that the Warren Court had also decided such high profile cases as *Brown v Board of Education*, *New York Times v Sullivan*, *Gideon v Wainwright*, and *Miranda v Arizona*, the choice of the reapportionment cases surprised many. For Warren, though, the reapportionment cases mattered because they were the key to the realisation of a truly democratic nation.³⁷³

The decision in *Baker* was controversial in the academy and divisive within the Court, although it met with broad public approval across the United States. The inability of the justices to reach a decision in *Baker* at the end of the 1961 term following oral

³⁶⁹ A statewide 'at large' election where every voter in the state casts a ballot for every member of the legislature as if it were a single legislative district would have favoured candidates from the most populate parts of the state. Smith, p. 124.

³⁷⁰ Ibid. p. 131.

³⁷¹ Ibid. pp. 124-37.

³⁷² Ibid. p. 3.

³⁷³ Ibid. p. 4.

arguments in April 1961 led to it being carried over to the following term, with a second series of oral arguments in October 1961. Over seven hours of oral arguments took place in *Baker*, a highly unusual occurrence.³⁷⁴ *Baker v Carr*³⁷⁵ was constitutionally significant for many reasons, not least because of the acrimonious nature of the debate between some of the justices over the standard of republican government, differences which ultimately destroyed the health of Justice Felix Frankfurter and Justice Charles E. Whittaker, forcing them off the Court.³⁷⁶

Two years after *Baker*, the Court made its famous ‘one person one vote’ decision in *Reynolds v Sims*. It is a testament to how far the Court travelled in two years that in *Reynolds v Sims* it eventually embraced the population based apportionment for both houses of a bicameral legislature that Solicitor General³⁷⁷ Archibald Cox argued was unnecessary in *Baker*. The Supreme Court’s odyssey from holding in *Baker v Carr*³⁷⁸ that the question of reapportionment was merely ‘justiciable’ to its decision in *Reynolds v Sims*³⁷⁹ that “The Equal Protection Clause requires substantially equal legislative representation for all citizens in a State regardless of where they reside” was completed in two years rather than the two to three decades Cox originally anticipated.³⁸⁰

5.1.2 Political and Civil Rights Context

New life was breathed into the civil rights movement in the post-war period, helped in part by the conviction that African Americans who had fought for the United States overseas must be protected at home. As John F Kennedy put it “when Americans are sent to Vietnam or West Berlin, we do not ask for whites only.”³⁸¹ The Cold War context was a particular problem for the U.S. with the Soviet Union making capital out of the treatment of African Americans as early as 1949.³⁸² However, progress in the area

³⁷⁴ Today the norm is for one hour of oral arguments per case with each lawyer being given thirty minutes.

³⁷⁵ *Baker v Carr*.

³⁷⁶ The eventual decision was 6-2. Justice Charles Whittaker had a mental breakdown due to the pressure of the case and left the Court before the vote was taken. Justice Felix Frankfurter was one of the two dissenting justices. One week after the decision came down he had a massive stroke and never returned to active duty on the Court. See Smith, pp. 90-92.

³⁷⁷ The Solicitor General is responsible for arguing cases before the Supreme Court on behalf of the U.S. Government. Sometimes referred to as ‘the Tenth Justice’ because they are seen as having a duty to the Court to help the justices find the right answer, even while they are still representing the government.

³⁷⁸ *Baker v Carr*.

³⁷⁹ *Reynolds*, p. 534.

³⁸⁰ Smith, p. 204.

³⁸¹ John F. Kennedy, ‘Radio and Television Report to the American People on Civil Rights’, (Boston, MA: John F Kennedy Presidential Library and Museum, 1963).

³⁸² Mary L. Dudziak, *Cold War Civil Rights : Race and The Image of American Democracy*, (Princeton, NJ: Princeton University Press, 2000), p. 38.

of equality for African Americans had been slow, with decisions such as *Brown v Board of Education* and *Gomillion v Lightfoot* being rare examples of improvement in a country where McCarthyism tore down many constitutional protections for the individual.

When President Lyndon Johnson introduced the Voting Rights Act in a speech before Congress in March 1965, his opening words reflected the fundamental linkage between equal voting rights and the future of American self-government: “I speak tonight for the dignity of man and the destiny of democracy.” Malapportionment and the denial of voting rights were separate but symbiotic issues, neither of which could be completely resolved while the other persisted. Rectifying the malapportionment issue would have somewhat rebalanced power towards urban areas in the South and across the country, but as long as voting rights were being denied to African Americans then the victory would be incomplete. The passing of the voting rights legislation without the Supreme Court’s action to end malapportionment would have effectively made the Voting Rights Act meaningless since, even if urban-dwelling African Americans had the vote, it would make little difference if it was still worth only about ten percent that of a rural white voter.

To American liberals the rulings of the Warren Court are viewed as a halcyon moment in American history when the traditionally conservative judiciary acted to remedy racial, social, political, and constitutional injustices, some of which were as old as America itself. To American conservatives, it was a period of judicial activism when the Court strayed far outside its brief in imposing its own prescription for social and political change. What the latter view neglects is the rapidly changing civil rights context within which the Court was operating. Even during the Eisenhower Administration civil rights were on the agenda. By the 1960s under Kennedy, and even more so under Johnson, civil rights was joined on the White House’s legislative agenda by voting rights, the Great Society, education and Medicare. This was the true revolution in the 1960s, and it was being orchestrated in precisely the place seismic political progress ought to occur – democratic institutions. The Warren Court’s decisions on reapportionment, as on school segregation, were on many levels, then, not usurping legislative and political prerogatives but anticipating them.

5.2 American Constitutionalism and Malapportionment

The Supreme Court's emergence as a defender of rights in American constitutionalism can be traced to footnote four of *Carolene Products* in 1938.³⁸³ However, this progress did not become evident until the 1950s at the earliest. Although this progress has been far from linear, and the Court's role often far from exemplary, one notable trend has been the steady expansion of the groups in American society to whom equality applies. However, as seen in the previous chapter, the struggles which have characterised the development of constitutionalism have not only come about as a result of a clash in interpretations between different groups in society, but also because of the competing value systems and internal bonding forces that Böckenförde noted.

No standard of republican government was explicitly defined in the Constitution. However, this ought not to have been a problem had state legislatures complied with the terms of their own constitutions for decennial reapportionment. Their failure to do so for sixty years in some cases constituted *political* ossification, not *constitutional* ossification. The reapportionment cases were therefore a political problem requiring a constitutional solution that only the Supreme Court was capable of providing. In resolving the cases and the broader malapportionment problem, the Supreme Court made reference to both the progressive understanding of political equality that had emerged in the United States with the expansion of the right to suffrage, and invoked texts and moments from the Declaration of Independence onwards.³⁸⁴ By requiring that the state legislatures show fidelity to state and federal constitutional mechanisms for recalibrating the political system in the face of social changes—the decennial reapportionment requirement—the Court solved the problem of political ossification that was blighting the democratic process. The reapportionment cases illustrate how the Court could, when pressed into action, stimulate democratic renewal when political processes stopped functioning or were usurped by special interests and oligarchical tendencies. However, as will be shown, long term positive effects from tackling malapportionment were compromised by the inability to deal with gerrymandering.

At the heart of the reapportionment issue were a number of deep underlying social and political changes. These changes include the emerging conflict between the interests of wealthy white rural areas, on one side, and, on the other, poorer urban areas

³⁸³ *Carolene Products*.

³⁸⁴ See *infra* note 455.

with faster growing populations of immigrants, African Americans and blue collar workers.³⁸⁵ Collectively, the reapportionment decisions can be seen as enunciating a conception of political equality based on an ever widening arc of social and political relationships.³⁸⁶

Germans had learnt the hard way from the National Socialist period what could be done when an elected government began to dismantle democracy and rights protections from within on the basis of unscrupulous legislative methods. In the United States, it took the McCarthyite assault on individual rights in the 1950s to make many Americans conscious of the dangers that can emerge from legislatures, as indeed Jefferson had warned of.³⁸⁷ *Baker v Carr*³⁸⁸ and the subsequent reapportionment cases which enshrined the principle of ‘one person one vote’ still resonate today because the scourge of malapportionment disproportionately impacted on poorer and less powerful urban voters, many of whom were African-Americans. J Douglas Smith writes that “In the American South [...] malapportionment served as a cornerstone of white supremacy ensuring the overrepresentation of the most ardent segregationists and thus further delaying the realisation of civil and voting rights for African Americans.”³⁸⁹

Many state legislatures had so corrupted the principle of republican government through their practice of malapportionment that by the time of *Baker v Carr* in 1962 there were no political avenues open to urban dwelling citizens in Tennessee or other states to seek redress for their underrepresentation in the state legislature. Only the federal courts provided an avenue for relief. *Baker* represented a paradox because the widespread practice of malapportionment, which was found in almost every state of the Union, was in fact a problem of minority rule by mainly rural voters who were over-represented in the legislatures. Malapportionment represented not so much the tyranny of the majority that the founders warned of, but rather the tyranny of a minority controlling a legislative majority. However, the urban majority was comprised of various minority groups, while the rural minority was predominantly white. This

³⁸⁵ Reapportionment was also a proxy conflict between big business interests—which strongly supported the rural legislators—and organised labour unions which supported the efforts of civil society and urban areas to receive more representation.

³⁸⁶ This was most evident through the incorporation of the Bill of Rights and the equality based decisions in *Brown v Board of Education*, and the 1960s reapportionment cases.

³⁸⁷ “It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. 173 despots would surely be as oppressive as one.” Thomas Jefferson, ‘Query XIII’, in *Notes on the State of Virginia*, (New Haven, CT: The Avalon Project, Yale Law School, 1781)

³⁸⁸ *Baker v Carr*.

³⁸⁹ Smith, p. 5.

demographic aspect highlighted how malapportionment directly attacked the political processes marked out for special judicial protection in paragraph two of *Carolene Products* footnote four.

By the early twentieth century, social change, immigration to the United States, and mass migration from rural areas to the cities had—in terms that are all too familiar given contemporary debates on Syrian refugees and Mexican migrants—turned wealthy white rural majorities into minorities in almost every state. The gross iniquity of malapportionment in Tennessee and almost all other states in the Union was manifested in voting districts with population variances of sometimes hundreds of thousands of people which, as the Supreme Court noted, meant rural citizens' votes were worth many times that of urban citizens. Such disparities meant that majority control of both houses of state legislatures could be achieved by legislators representing less than 40 percent of the population and, in some of the worst cases, less than 25 percent of the population.³⁹⁰ The smallest district in Tennessee's lower house in 1962 had 3,454 inhabitants, while the largest district had 79,301.³⁹¹ The reapportionment cases were fundamentally about the quality and quantity of representation, and the power balance between on one side, wealthy white rural voters and business interests, and on the other, the interests and rights of blue collar workers, immigrants African Americans, Catholics, and Jews who were in faster growing urban areas.

Although the worst excesses of malapportionment were in state legislatures, Congressional districts were also affected because the states were primarily* responsible for federal redistricting. 35 percent of congressional districts were said to be malapportioned by 1960.³⁹² Congressional districts in Michigan drawn by the Republican controlled legislature ranged in population from 117,431 to 802,994.³⁹³ Malapportionment of congressional districts thus compounded the under-representation of urban residents in state legislatures. In the House of Representatives, 8 of the 20

³⁹⁰ In Tennessee, the theoretical minimum percentage of the population capable of electing a majority of the legislature was 28.7 in the lower house and 26.9 in the state's Senate. In Florida, the figure was 12 percent in both houses. In California, the figure was 10.7 percent for the Senate, while in Nevada it was 8 percent. See *ibid.* pp. 287-88.

³⁹¹ *Ibid.* p. 288.

* Article 4, Section 1 of the Constitution gives Congress the power to legislate and amend any state regulations for the conduct of federal elections.

³⁹² Smith, p. 18.

³⁹³ Sam Rayburn, a Democrat from Texas, and House Speaker, came from the fifteenth least populous district in the country, receiving fewer than 16,000 votes when he was re-elected in 1958. *Ibid.* p. 19.

powerful committee chairs came from overrepresented districts, highlighting the pervasive effect of malapportionment on politics at the state and national level.

In a 1960s America where the questions of civil rights and political equality were becoming incendiary issues, malapportionment seemingly constituted a further injustice preventing the adequate representation of certain groups in American society if they happened to live in urban rather than rural areas. As problematic as the effects of malapportionment were on state and national politics, its effects on the civil, social, and economic rights of citizens were even more serious. How malapportionment enshrined minority rule while also denying individuals the rights that affected every aspect of their lives is the question we turn to now.

5.3 The Tyranny of the Local Minority

As seen in the previous chapter, James Madison recognised that tyranny was most likely at the local level but he also feared that eighteenth century malapportionment would contaminate representation at the federal level unless Congress had the power to override state control of federal elections.³⁹⁴ Malapportionment was also present in the state legislatures of the eighteenth century. Jefferson deplored the situation in Virginia where the tidewater counties continued to insist on the older territorial principle of two representatives per county to offset the growing influence of western counties in the state assembly.³⁹⁵ During the Constitutional Convention, Madison presciently feared that the states would contaminate representation at the federal level.

The inequality of the Representation in the Legislatures of particular States, would produce a like inequality in their representation in the Natl. Legislature, as it was presumable that the Counties having the power in the former case would secure it to themselves in the latter.³⁹⁶

Madison argued in *Federalist 51* that a natural balance between the large number of interests in a continental sized republic would render “an unjust combination of a

³⁹⁴ Article 1, Section 4 of the Constitution does just that.

³⁹⁵ Willi Paul Adams, *The First American Constitutions: Republican Ideology and The Making Of The State Constitutions In The Revolutionary Era*, (Rowman & Littlefield Publishers, 2001), p. 234.

³⁹⁶ James Madison, 'Records of the Federal Convention, 9 August 1787', (Chicago: University of Chicago Press, 2000). Madison also anticipated the late nineteenth and twentieth century practice of many states to award their counties one senator each to create one chamber based on a non-population basis in order to counter balance the power shift to urban areas.

majority of the whole very improbable, if not impracticable”³⁹⁷. Madison’s faith in a balance between social forces to prevent tyranny across the country as a whole was partially correct. However, politics remained local and the same veniality Madison identified in state legislatures in the eighteenth century frustrated political attempts to solve the malapportionment issue in the twentieth century.³⁹⁸

With the vote of a rural inhabitant of Tennessee worth up to twenty times that of an urban dweller in some cases, the result was that in state and federal elections legislators would be elected who would represent the interests and rights of a minority of (mainly) white voters and not the majority who dwelt in the cities.³⁹⁹ Malapportionment showed that when representative democracy did not represent certain groups they were more likely to have their individual rights infringed as well. One example was how malapportionment exacerbated the effects of segregation and allowed state legislatures to resist the Court’s integration ruling in *Brown v Board of Education*. In 1956, when the Virginia legislature voted to close public schools rather than integrate, the seventeen senators who opposed the measure represented more Virginians than the twenty-one state senators who voted in favour of the action.⁴⁰⁰

Malapportionment was therefore not merely a problem for democratic legitimacy. It affected citizens’ individual, economic, civil, and social rights. Minority control of legislatures across the United States impacted on the ability of civil society groups and others seeking progressive reform to improve working conditions, increase funding for health and education programmes, and advance civil rights protections.⁴⁰¹ As Justice William Brennan’s majority opinion in *Baker* put it, “if present representation has a policy at all, it is to maintain the status quo of invidious discrimination at any cost.”⁴⁰² Urban areas with larger populations suffered from chronic underfunding of community infrastructure and educational provision. City and municipal officials across Tennessee joined the court action in *Baker* including

³⁹⁷ Madison, Hamilton, and Jay, 'Number 51 (Madison)', p. 321.

³⁹⁸ Charles Rhyne, the attorney for the appellants seeking judicial relief noted that in Tennessee “every bill for reapportionment since 1901 has [been] voted down in the Senate; no such bill has ever received more than 13 of the 33 votes; and in the House, no bill has ever received more than 36 of the 99 votes.” *Baker v Carr (Oral Argument)*, 396 U.S. 186 (1962).

³⁹⁹ James Cummings, one of the most prominent rural legislators, remarked to a reporter, “I believe in collecting the taxes where the money is—in the cities—and spending it where it’s needed—in the country.” Smith, p. 54.

⁴⁰⁰ Ibid. p. 19. These decisions to close public schools rather than allow integration were subsequently overturned in state and federal courts.

⁴⁰¹ Ibid.

⁴⁰² *Baker v Carr*, p. 258.

Nashville mayor, Ben West, whose office provided crucial statistical evidence of the discriminatory effects of malapportionment.⁴⁰³

The involvement of civil society actors such as the League of Women Voters (LWV), state municipal officials, and the executive branches of the federal government in highlighting the iniquity of malapportionment gave the issue a profile which proved indispensable to its eventual resolution. This public awareness proved important in initiating the litigation in *Baker* and in bringing on board the *amicus curae*⁴⁰⁴ support from both the Eisenhower and Kennedy administrations for the Supreme Court challenge. Equally clear, however, was that years of concerted civil society action against malapportionment had failed to shame legislators into reapportioning or secure change through political channels. In 1962, only five states – Massachusetts, New Hampshire, Oregon, West Virginia and Wisconsin – apportioned “so that majorities in both chambers of the legislature represented at least 40 percent of the population.”⁴⁰⁵ Individual voters and even active groups such as the LWV lacked the means to resist when the political institutions of the state have been captured by legislators who had manifestly subverted law, their state constitutions, and the U.S. Constitution to secure their office. The reapportionment cases represent the paradigmatic examples of political issues that could not have been solved without judicial intervention since it was too much to expect legislators to willingly vote themselves out of office and a job.

Appearing before the Court during oral arguments in *Baker*⁴⁰⁶, Archibald Cox⁴⁰⁷, the U.S. Solicitor General, highlighted this tension between legislative usurpation and the faltering resistance of the citizens, which he argued can only succeed through the courts.

We've often been reminded and quite right that the ultimate safeguard of constitutional rights is a vigilant electorate. But where the wrong goes to the existence or distribution of the franchise, then the electorate can do nothing to protect itself. No matter how vigilant the majority of the people of Tennessee are, there is

⁴⁰³ West's office showed how malapportionment affected state aid for education and the disbursement of gasoline and motor tax revenues that paid for roads, bridges and other infrastructure. When *Baker* was re-argued in October 1961 this new information made a significant impression on the Court. See Smith, p. 61.

⁴⁰⁴ Meaning friend of the court.

⁴⁰⁵ In twenty-three states the theoretical minimum of the population electing a majority of the state senate was less than 30 percent, and in ten of those the figure did not reach 20 percent. See Smith, p. 17.

⁴⁰⁶ This was unusual for the U.S. Government to support a case in this way

⁴⁰⁷ Cox is perhaps most famous for being fired as Special Prosecutor by Richard Nixon during the Watergate crisis after Cox demanded that Nixon hand over the tapes.

nothing that they can do under these circumstances to assert their constitutional rights. [...] The short of this case is as Judge Miller pointed out in his opinion convening the three-judge court that either there is a remedy in the federal court or there is no remedy at all.⁴⁰⁸

Cox was essentially making the point about malapportionment addressed by John Locke in his *Two Treatises of Government*.⁴⁰⁹ As will be seen in the next section, the arguments presented before the Court in *Baker* and the other reapportionment cases represented a tension within the constitution—whether the federal courts could compel the state legislatures to reapportion—and the demands of citizens to have their constitutional rights upheld.

5.4 A Crying Necessity

Theoretically at least, respect for the principle of separation of powers requires that the courts only rule on cases which are ‘justiciable’⁴¹⁰ in order to preserve the distinctions between the ‘political’ and ‘judicial’ functions.⁴¹¹ The idea behind this demarcation is simply but importantly to preserve the principle of representative government which is clearly established by the Constitution. That the threat *to* representative government was originating *from* citizens’ legislative representatives was an irony lost on none of those involved in the battle against malapportionment.

As noted in the previous section, *Baker v Carr* arose partly as a consequence of long-term concerns among civil society groups in the U.S. over malapportionment by state legislatures. Groups like the LWV and other civil society groups were acutely aware of the constitutional requirements of their own states and wanted their state representatives to uphold the oaths they had taken.⁴¹² Individuals and municipal officials repeatedly sought relief through political channels but were thwarted by what Smith called “a conspiracy of inaction.”⁴¹³ The case standing in the way of federal support to end the iniquity of malapportionment was *Colegrove v Green* in which Justice Felix Frankfurter wrote the majority opinion calling for judicial abstention and arguing that

⁴⁰⁸ *Baker v Carr (Oral Argument)*.

⁴⁰⁹ See Holmes, p. 168; 307. “Locke granted the power to reapportion the elected assembly to the unelected executive.” Holmes noted that Locke’s argument was echoed by Chief Justice Warren in his opinion in *Reynolds v Sims*.

⁴¹⁰ Subject to adjudication in the federal courts. See, for example, ‘Justiciability’, in *Legal Information Institute*, (New York: Cornell University Law School).

⁴¹¹ See Sweet, ‘Why Europe Rejected American Judicial Review: and Why it May Not Matter’, p. 2777.

⁴¹² Smith, p. 52.

⁴¹³ *Ibid.* p. 5.

the courts should not wade into “the political thicket.”⁴¹⁴ Almost sixteen years later and Frankfurter was still adamantly opposed to the Court getting involved in reapportionment. However, six new justices had joined the Court in the intervening years and malapportionment by the states was on the agenda of the executive branch.

The publication of the Kestnbaum Report in 1955 on the relationship between the federal government and the states had highlighted the issue of malapportionment.⁴¹⁵ Senator John F. Kennedy referred to the issue of malapportionment as “The Shame of the States” in an article he wrote for *New York Times Magazine* in 1958.⁴¹⁶ Support for those fighting malapportionment in the states also extended to the federal government. J. Lee Rankin, the Solicitor General in the Eisenhower Administration saw malapportionment as an invidious practice which required judicial relief. During the transition period to the incoming Kennedy Administration Rankin arranged for the Justice Department to file an *amicus* brief in support of the Tennessee appellants, of whom Baker was the first named on the appeal.⁴¹⁷ Such *amicus* support from the executive branch of the federal government for an appellant is quite unusual,⁴¹⁸ and possibly convinced two of the justices, Potter Stewart and Tom Clark, that only the federal courts could resolve malapportionment.⁴¹⁹ Perhaps more interestingly, the *amicus* support highlighted how malapportionment had created an unspoken alliance between the federal government and civil society against the states.

The reapportionment cases showed how existing American values, particularly equality, were recapitulated in the context of a period where the demand for civil rights for all Americans had never been stronger and where, for once, civil society and the federal government were equally active in driving the rights agenda.⁴²⁰ Constitutionalism requires a higher principle—political processes which are logical and

⁴¹⁴ *Colegrove*.

⁴¹⁵ Its official title was the ‘Commission on Intergovernmental Relations’. In the preface, the Chairman of the Commission, Meyer Kestnbaum referred to the report as “an intensive study of National-State-local relationships--the first official undertaking of its kind since the Constitutional Convention in 1787.”

⁴¹⁶ John F. Kennedy, ‘The Shame of the States’, in *New York Times Magazine*, (New York, 1958).

⁴¹⁷ Smith.

⁴¹⁸ In total, seven *amicus* briefs were filed in support of *Baker*, much higher than the mean average for the period 1955-1965 of 1.90, and indicating a large degree of support from the executive branch of the federal government, and from civil society groups including trade unions and the League of Women Voters. See Joseph D Kearney and Thomas W Merrill, ‘The Influence of Amicus Curiae Briefs on The Supreme Court’, *University of Pennsylvania Law Review*, 148, (2000), 754.

⁴¹⁹ See Cornell W Clayton, *The Politics of Justice: Attorney General and the Making of Government Legal Policy*, (Routledge, 2015), p. 134.

⁴²⁰ Wolin puts this slightly differently, noting that the democratic gains from the mid twentieth century onwards were “mainly initiated, not by the state, but by an increasingly politicised civil society.” Wolin, *The Presence of The Past : Essays on The State and The Constitution*, p. 78.

not arbitrary, and a set of statutory and policy outcomes that do not infringe either the citizen's constitutional rights or more fundamental ones.⁴²¹ Equality *was* such a higher principle and its providence in American political history is beyond reproach, but it did not fundamentally figure in *Baker* as a justification for the decision; it would have to wait till *Reynolds v Sims*. Rather, the main question at issue was justiciability and whether malapportionment was a ripe topic for judicial oversight.

To some, the involvement of a court in managing the processes of representative democracy raised the spectre of the counter-majoritarian difficulty which was discussed in the previous chapter. With the reapportionment cases, the Supreme Court acted to support majority rule and the demands of civil society by ensuring that representative government functioned properly. That was not to say—and this was the key point that arises in the reapportionment cases—that properly functioning representative government need necessarily mean perfect equality in terms of one person one vote; certainly the American framers never viewed republican government in such generous democratic terms. Some required only that a government not be a monarchy to meet the republican test.⁴²²

One irony was that nor did Solicitor General Archibald Cox who appeared in *Baker* as *amicus curae* to support the appellants' case against the State of Tennessee. During oral arguments, Cox went out of his way to emphasise that population equality was *not required* by the Fourteenth Amendment: "I am not [...] intending to suggest that the Fourteenth Amendment requires the apportionment of Representatives in both houses of the Legislature, in the ratio to the population. It's quite plain [to me] that that is not the Fourteenth Amendment requirement."⁴²³ Cox was being deliberately cautious in not seeking a more sweeping ruling from the justices in *Baker* as he felt that might jeopardise his fundamental goal that the Court reverse the precedent in *Colegrove v Green* and declare reapportionment a justiciable issue. Despite arguing for the Court to wade into the political thicket in *Baker*, Cox's position was, like his former law professor, Felix Frankfurter, cautious about how judicial power ought to be used. As much as Cox wanted the Court to step into the reapportionment issue, which he saw as the only way of resolving it, his caution about the Court wading into enunciating a mathematical standard too fast likely bolstered the credibility of his argument among the

⁴²¹ Indeed, as Murphy notes, constitutionalism is predominantly concerned with value outcomes. See Walter F Murphy, 'An Ordering of Constitutional Values', *S. Cal. L. Rev.*, 53, (1979), 729.

⁴²² See Ely, p. 123.

⁴²³ *Baker v Carr* (Oral Argument).

justices whose votes were needed to overturn *Colegrove*. During the re-argument of *Baker*, Cox observed:

This Court doesn't carry the whole burden of Government and for it to rush in to try and right political wrongs instead of leaving them to the other branches—the political branches of the Government—could impair its usefulness in our constitutional system. But I suggest to you that judicial inaction through excessive caution or through a fancied impotence in the face of crying necessity and very serious wrong may also do damage to our constitutional system.⁴²⁴

Wrapping up his remarks, Cox then shrewdly reminded the justices of Robert Jackson's thoughts on the relationship between the Court and democracy prior to him being appointed to the Court in 1941. Then Attorney General, Jackson wrote in *The Struggle for Judicial Supremacy*⁴²⁵:

W]hen the channels of opinion and of peaceful persuasion are corrupted or clogged, these political correctives can no longer be relied on, and the democratic system is threatened at its most vital point. In that event, the Court, by intervening, restores the processes of democratic government; it does not disrupt them.[...] [A] court which is governed by a sense of self-restraint does not thereby become paralyzed. It simply conserves its strength to strike more telling blows in the cause of a working democracy.

Jackson's view here echoes Madison's speech in Congress introducing the Bill of Rights where he referred to the judiciary as "an impenetrable bulwark against every assumption of power in the legislative or executive."⁴²⁶ However, it also represents the essence of footnote four of *Carolene Products*.

The majority opinion in *Baker* rejected the idea that granting relief was a violation of separation of powers boundaries, arguing that the individual states were not protected by the political question doctrine, and that the only relevant issue was "the consistency of state action with the Federal Constitution". Without deciding on the merits of the claim, the majority opinion of Justice William Brennan held that "the complaint's allegations of a denial of equal protection presented a justiciable

⁴²⁴ Ibid.

⁴²⁵ Robert H. Jackson, *The Struggle for Judicial Supremacy : A Study of a Crisis in American Power Politics*, Caravelle edn (New York: Vintage Books, 1941).

⁴²⁶ See *supra* note 287.

constitutional cause of action upon which appellants are entitled to a trial and a decision.”⁴²⁷

Although the eventual result in *Baker* was 6-2, it had been a fairly evenly divided Court for much of the deliberations. Cox did not want to risk the decision going in Tennessee’s favour by asking the justices to decide on the principle at issue in the case (i.e. whether the malapportionment constituted a Fourteenth Amendment violation), let alone ask them to come up with a solution to the question of what the standard of representative government should be. Cox was simply trying to avoid the case getting thrown out, which likely would have killed all attempts to tackle malapportionment for a generation. While Cox argued that the case looked like a Fourteenth Amendment violation, he did not want to push the justices to making that call, because if they had been forced to decide *Baker* on the merits of the case rather than merely the justiciability question, they would then have had to supply a remedy for which there probably was insufficient votes.⁴²⁸ Indeed, had the Court felt compelled to decide on the principle at issue, it would also have had to decide whether a principle—such as equality—would have to apply to *both* houses of a bicameral legislature.

Justice Tom Clark was also concerned about stepping into Frankfurter’s “political thicket”⁴²⁹ and began to write an opinion rejecting the complaint of *Baker* and the other Tennessee voters who were seeking relief. After trying to muster arguments against granting relief to the Tennessee voters, Clark changed his mind, accepting Cox’s argument that the situation would never resolve itself without the intervention of the federal courts.⁴³⁰ Once he recognised this, Clark was keen for the Court to leap in and decide the case on its merits, by stating that the Tennessee malapportionment *was* a clear violation of the Equal Protection Clause.⁴³¹ Clark went on to say in his concurrence opinion that the apportionment picture in Tennessee was “a topsy-turvical of gigantic proportions” and “a crazy quilt without rational basis”.⁴³² Once the Court had ruled that reapportionment was justiciable in *Baker*, the question before the justices

⁴²⁷ *Baker v Carr*, p. 187.

⁴²⁸ After the 6-2 decision came down in *Baker*, Cox wrote in a memorandum to Attorney General: “It is no exaggeration to recognize among ourselves that we played the most important role in *Baker v Carr*, and our brief and argument may even have determined the result.” See Clayton, pp. 134-35.

⁴²⁹ This was in Frankfurter’s majority opinion in *Colegrove v Green* which was overturned by *Baker*.

⁴³⁰ Smith, pp. 88-89.

⁴³¹ *Baker v Carr*, p. 251.

⁴³² *Ibid.* p. 254.

in future cases was whether they ought to simply restore a modicum of rationality to the process or would have to come up with a constitutional standard of representation.

5.5 Struggle and Progress

The development in the Court's reasoning from *Baker v Carr* to the later reapportionment cases *Gray v Sanders* and *Reynolds v Sims* presents us with two starkly different visions of representative government. In *Baker*, although the more conservative 6-2 majority opinion did not decide on the principle at issue in the case, the holding that it *was* a justiciable matter opened a floodgate of litigation⁴³³ against the malapportioning states. Just over one year later in *Gray v Sanders*, Justice Douglas's majority opinion first enunciated the 'one person-one vote principle', and then in *Reynolds v Sims*, Chief Justice Warren officially declared that one person one vote would be the new standard for both houses of a bicameral legislature. Although, it would not, of course, apply to the U.S. Senate.

Contextualising this move from a system of apportionment that merely has to avoid being arbitrary and capricious to 'one person one vote' is explained through the shift in constitutionalism from a charter of fixed rules intended to, as Kay puts it, "fence out certain subjects from [...] public regulation"⁴³⁴ to a system of values which recognises the gradual realisation of equality and human dignity in American history, and their extension to ever more citizens. This fits the historical understanding of constitutionalism identified by Stanley Katz as a process of struggle.⁴³⁵ The move to one person one vote can be seen in this light as reflecting a number of parallel transitions and struggles. The first was the shift within law identified by Bobbitt from an emphasis on groups (including racial and ethnic groups, unions, political parties, sectarian organisations, the underprivileged, and marginalised) to a greater focus on individuals, which was manifested in the 'rights revolution' "wherein the interests of groups against the state were vindicated through individual lawsuits."⁴³⁶ The second, as seen in Chapter 4, was a parallel shift in the position of the Supreme Court in 1938 from its decades-old defence of economic rights to an equality-centric orientation which

⁴³³ Within seven weeks of the decision that apportionment of state legislatures was justiciable, law suits were commenced in 22 states. See James B Atleson, 'The Aftermath of Baker v. Carr. An Adventure in Judicial Experimentation', *California Law Review*, (1963), 535. In his opinion in *Reynolds*, p. 587.n.30, Chief Justice Earl Warren writes that within nine months of the Court's decision of justiciability in *Baker*, "litigation challenging the constitutionality of state legislative apportionment schemes had been instituted in at least 34 states."

⁴³⁴ Kay, p. 19.

⁴³⁵ Katz, (2007).

⁴³⁶ Bobbitt, p. 125.

would instead give greater protection in law to individuals and minority groups.⁴³⁷ Thus, Goodman argues that since the mid-1940s the Supreme Court has treated human dignity as a constitutional value.⁴³⁸

Of course, the breakdown of these group identifications and associational bonds to the broader focus on the individual represented precisely the problem that Böckenförde was concerned about, where the state no longer had the necessary glue to hold itself together and maintain its relationship with its citizens. Patriotic sentiment in American life could not disguise the deep divisions and conflict that American history had revealed. Many of these divisions were based on a strong differentiation in values between urban and rural, and north and south. These shifts towards individual equality also indicated that the civic space where interests were previously mediated had collapsed. This change from individuals as communal beings to isolated ones meant that rights could only be realised through law rather than from cooperation and contestation in the civic space.

Politically, *Baker v Carr* and the other malapportionment cases were certainly about the problem of disproportionate power being wielded in the interests of ever smaller groups of people. Yet the dire implications of this imbalance for the rights of those citizens without power in terms of education, schooling, and other areas of state activity illustrated that the principle fundamentally at stake *was* human dignity. As Ely notes, the Fourteenth Amendment and Fifteenth Amendment along with the extension of the franchise to wider groups and constituencies reflects a developing commitment to “equality in the distribution of various goods”.⁴³⁹ “Valuing a vote thus granted at a fraction of the votes of others obviously undercut the commitment this constitutional development reflects.”⁴⁴⁰

In his dissent in *Baker*, Justice Frankfurter wrote that the Court’s decision that state legislative apportionment was a justiciable matter amounted to “a massive repudiation of the experience of our whole past in asserting destructively novel judicial power.”⁴⁴¹ Frankfurter’s use of the words ‘whole past’ contained in it the passion with which he viewed the issues at stake in the case. *Baker* effectively reversed the majority

⁴³⁷ Robert Green McCloskey, *The Modern Supreme Court*, (Cambridge, Mass: Harvard University Press, 1972), p. 3.

⁴³⁸ Goodman, 'Human Dignity in Supreme Court Constitutional Jurisprudence', p. 748.

⁴³⁹ Ely, p. 123.

⁴⁴⁰ Ibid.

⁴⁴¹ *Baker v Carr*, p. 267.

holding of *Colegrove v Green*⁴⁴² (which he wrote) that legislative apportionment represented a “political question” that was non-justiciable. In denying the wisdom of the Court intervening in the reapportionment question, Frankfurter’s technical argument was that nowhere in the Constitution was equal representation between districts assumed to be the basis of republican government.

Frankfurter’s advice that Tennessee voters use the political channels to resolve malapportionment seemed equally out of touch with the reality, both of what America had become, and the practical possibility of getting a large number of rural legislators to reapportion themselves out of a job. His dogged embrace of the past in the face of the manifest injustice of malapportionment in the present suggest someone struggling to recognise the merit of his mentor Holmes’s view⁴⁴³ that the Constitution needs interpreting “in the light of our whole experience and not merely in that of what was said a hundred years ago”. While Frankfurter was passionate about judicial restraint, that philosophy led him, I think, down the intellectual cul-de-sac of the political question doctrine, which ultimately produced inconsistencies in his own thinking about when the Court should intervene in the political system to defend individual rights.⁴⁴⁴

As stated in the introduction, this development illustrates the innate tension between stability and renewal in constitutionalism, and shows how the development in the Court’s thinking reflected a longer term expansion in the number of individuals and groups to whom the terms ‘equality’ and ‘dignity’ could be applied, along with the particular areas of individual activity liable for protection. A stability argument might say that the Court had to end the clearly unconstitutional and egregious legislative apportionment schemes which, if left unchecked, could have been a cause of political unrest.⁴⁴⁵ A renewal argument might say that stability could not be an end in itself, and that American history had seen an incremental but progressive improvement in equality between individuals and groups, which was essential for the achievement of human dignity. Hence, the Court should be guided by the understanding of equality in the early 1960s, not 1868, or even 1776. While popular majorities can sometimes lead to the promulgation of laws that can be a threat to equality and human dignity, it is also clear,

⁴⁴² *Colegrove*.

⁴⁴³ *State of Missouri v Holland*, pp. 433-34.

⁴⁴⁴ The key inconsistency being his defence of judicial intervention in politics in *Gomillion v Lightfoot*. Frankfurter was prepared to tackle racially motivated malapportionment, but not in *Colegrove* or *Baker* to tackle malapportionment against all groups in society.

⁴⁴⁵ Former solicitor general, Theodore Olson, makes a similar point. See *infra* note 483.

as Murphy observes, that “allowing all adults to participate in governing the community is a mark of respect for human dignity”⁴⁴⁶. There was, therefore a fundamental inconsistency between Frankfurter’s dogged embrace of a philosophy of judicial deference to the will of democratic majorities and his opposition to the Court entering “the political thicket” to restore majority rule.

With six post-*Baker* cases scheduled for oral arguments in November 1963 including the Alabama case, *Reynolds v Sims*, Bruce Terris an assistant to Archibald Cox, sent the Solicitor General a memo addressing the question of what position the Justice Department should take on the standard of apportionment. The question that the Supreme Court had ducked in *Baker* was what the standard of apportionment should be. Would the vast majority of states with bicameral legislatures be able to reapportion one house on factors other than population? This was the question preoccupying both the justices on the Court and also officials in the Justice Department who had seen how impactful their amicus brief in *Baker* had been. Given the wave of law suits initiated in the wake of *Baker*, the question of apportionment standards could not be kicked down the road indefinitely. Crucially, Terris noted that historical precedents for a reapportionment standard based on factors other than population were no longer tenable in the light of changing social circumstances and the evolving understanding of equality. “The meaning of equal protection is necessarily a changing concept,” Terris noted.⁴⁴⁷ Citing the assimilation of African Americans and women into the American body politic, and the Seventeenth Amendment of 1913 providing for the direct election of senators, Terris added that

the history of this country shows increasing awareness of the requirement that all citizens be permitted to participate equally in our government.[...] The Equal Protection Clause today requires that both houses of the state legislature be apportioned on the basis of population.”⁴⁴⁸

Far more than Cox, who remained cautious in asking the Court to put its reputation on line—and possibly create a constitutional crisis⁴⁴⁹—by committing to a standard of

⁴⁴⁶ Murphy, 'An Ordering of Constitutional Values', p. 746.

⁴⁴⁷ Smith, p. 161.

⁴⁴⁸ Ibid.

⁴⁴⁹ In fact, a long running constitutional crisis did unfold. Everett Dirksen, the Senate Minority leader, drove an effort to have a constitutional amendment stripping the Court of jurisdiction over reapportionment. When that failed, Dirksen launched a campaign to call a constitutional convention for the same purpose. That almost succeeded but came up one state legislature short of the required 34 states to call a constitutional convention, which would have been the first since 1787.

equality, Terris presciently saw that a majority of justices were moving towards a conception of equality based on one person one vote. By contrast, Cox's gradualist approach anticipated that the country might be ready for total population equality between electoral districts in perhaps twenty or thirty years.⁴⁵⁰ The narrative of struggle followed by progressive historic development that Terris outlines, anticipates almost exactly Earl Warren's *Reynolds* opinion which notes the "continuing expansion of the scope of the right of suffrage"⁴⁵¹. More broadly, though, Terris's advice reflects the shifting jurisprudence of the Supreme Court towards a more equal conception of representative democracy based on the idea that each person's vote must be weighted the same. Once the Court had decided that the existing system was wrong 'one person one vote' had to be the end destination.

If the Court had not announced a one person one vote standard and had instead left it as 'not capricious or arbitrary', then it would likely have ended up sitting in judgement on every apportionment plan for the fifty states — every bit the mathematical quagmire Felix Frankfurter had warned about.⁴⁵² Arbitrariness might lie in the eye of the beholder and "a map that one judge might think was pure hodgepodge might to another judge reflect permissible balance of historical boundaries and multifactored modern realities."⁴⁵³ When the Court announced one person one vote, more than forty state legislatures were apportioned on a basis that did not meet the new standard.⁴⁵⁴ This was certainly an indication of the bureaucratic level of judicial scrutiny that most of these states would have had to face with a less equitable system and a more administratively burdensome standard than one person one vote.

The value/renewal answer was that it was right for the times. The principle of equality in the Equal Protection Clause was the cause of the original complaint in *Baker*. Equality had been one of America's defining values since 1776. The precedent that separate is not unequal which had stood since *Plessy v Ferguson* was quashed in the *Brown* decision, and along with *Gray*, *Reynolds* and the other cases underlined the idea

⁴⁵⁰ In a memo to Robert Kennedy, Cox wrote that "reading the principle 'one man, one vote' into the Equal Protection Clause" would be "a major blunder today". Smith, p. 204.

⁴⁵¹ *Reynolds*, p. 555.

⁴⁵² *Baker v Carr*, p. 268. Frankfurter said the Court was catapulting the lower courts of the country into a "mathematical quagmire [...] without so much as adumbrating the basis for a legal calculus as a means of extrication."

⁴⁵³ Akhil Reed Amar, *America's Unwritten Constitution : The Precedents and Principles We Live By*, (New York: Basic Books, 2012), p. 193.

⁴⁵⁴ *Ibid.* p. 194.

that equality, and ultimately, human dignity, had become, at least during the Warren Court, fundamental principles of American constitutional government.

Anticipating Akhil Amar's identification of the equality principle as part of his unwritten constitution, Justice Douglas's majority opinion in *Gray v Sanders* observed that

The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.⁴⁵⁵

There was no indication in the Constitution or from the founders that one person one vote was the proper standard of representation for republican government. What was beyond doubt, however, was that the framers had clearly “acknowledged popular consent as the indispensable basis for setting up that process of government in the first place.”⁴⁵⁶ The consent of the governed was the fundamental basis of legitimacy for the entire revolutionary endeavour.⁴⁵⁷ One founding document which did point the way was the Northwest Ordinance of 1787 which established the principle of equality in legislative apportionment for future states beyond the Appalachian Mountains.⁴⁵⁸ While the Ordinance meant an equality for some white men only, it nevertheless guaranteed “a proportionate representation of the people in the legislature”.⁴⁵⁹ As with the Declaration of Independence, the Northwest Ordinance, the Gettysburg Address and *Brown v Board of Education*, so *Baker v Carr* and *Reynolds v Sims* symbolised the progressive expansion of the individuals and groups to whom equal protection applied. According to Eberle, only around the time of *Brown* did the Court “make equality a premier organising principle of American society”.⁴⁶⁰

As I suggested at the outset, equality or equal protection means little without some sense of who these principles apply to and who is equal with whom. Constitutionalism therefore requires not just equality but a framework for reimagining its scope and potential. One person one vote represented a progress centric view of

⁴⁵⁵ *Gray*, p. 381.

⁴⁵⁶ McCloskey, p. 283.

⁴⁵⁷ This remains the case. As highlighted in the German cases, representative government is the primary means through which popular sovereignty is represented, and thus is vital to ensure the legitimacy of political action. See Brenner, p. 139. He notes that “the principle of representation effectuates the people's sovereignty in a state governed by a constitution.”

⁴⁵⁸ Smith, p. 14.

⁴⁵⁹ 'The Northwest Ordinance 1787', (Yale Law School), pp. Section 14, Article 2).

⁴⁶⁰ Eberle, p. 50.

American constitutionalism which saw the malapportionment problem in the context of the country's emerging constitutional narrative.

5.6 Restoring Majority Rule and Individual Rights

Baker and the reapportionment cases highlight the extent to which the counter-majoritarian critique was based on several rather dubious assumptions. One was the idea that there was even agreement on what the standard of representative government ought to be. Another was the idea that the representatives and officials being overruled by the courts were actually enacting the policies of the majority, rather than representing the interests of a rural minority which was the reality prior to the apportionment decisions. The 'counter-majoritarian' label was merely a more virtuous sounding label for the idea that judges shouldn't meddle in politics, as Frankfurter instinctively felt. Such a lethargic view of the Court's role would probably have surprised John Rutledge, who as we saw, argued at the Constitutional Convention that one of the Court's chief functions was to secure national rights.⁴⁶¹ Presumably he might well have included in this 'political rights' which had been denied to citizens by the malfeasance of their elected politicians.

When the political processes had ossified as much as they had in the United States prior to the reapportionment decisions, the potential for crises to develop is just as likely as when change occurs too suddenly. The reapportionment decisions ended the usurpation of the political process by rural minorities and brought about the majority rule that malapportionment had blocked. The decisions in the reapportionment cases illustrate the development towards a conception of constitutionalism centred on the values of human dignity and democracy. As Justice William Brennan put it, "interpretation must account for the transformative purpose of the text" and that purpose was "a sublime oration on the dignity of man".⁴⁶² However, the reapportionment cases also highlight Bruce Ackerman's point that preserving America's constitutional tradition means "unconventional innovation and democratic renewal".⁴⁶³ Although there was criticism of the decision in *Baker*, and the later one person one vote stipulation in *Reynolds* from politicians across the South and in the academy, the degree of compliance with it was significant. By the summer of 1966 forty-six of the fifty states

⁴⁶¹ Christopher N May and Allan Ides, *Constitutional Law National Power and Federalism: Examples and Explanations*, (Aspen Publishers Online, 2007), p. 21.

⁴⁶² Brennan Jr, p. 28.

⁴⁶³ Bruce Ackerman and Neal Katyal, 'Our Unconventional Founding', *The University of Chicago Law Review*, 62, (1995), 573.

had “substantially complied with the Supreme Court’s mandate”⁴⁶⁴ and over half of the new intake to the House of Representatives in 1968 were from newly drawn congressional districts⁴⁶⁵. The principle of equal representation may well press a button in the American psyche which goes back to the revolutionary cry of ‘no taxation without representation’. Indeed, as Ely puts it, “the equal weighting of everyone’s vote turned out to be a notion with which most people could sympathise.”⁴⁶⁶

“Every government degenerates,” wrote Jefferson in 1781, “when trusted to the rulers of the people alone. The people themselves therefore are its only safe depositories.”⁴⁶⁷ Jefferson’s instinctive faith in the people was vindicated by the civil society actors that fought malapportionment during the 1950s and 1960s, even though those groups were fighting the wealthy rural interests from which Jefferson himself came. The involvement of newspapers and civil society actors like the League of Women Voters over a prolonged period sustained a vital public dialogue about malapportionment which put the issue on the agenda of parts of the federal government.⁴⁶⁸ However, their considerable efforts had met only resistance from state legislatures. When civil society turns to the courts to correct structural defects, inequalities and corruption in political institutions—which devalue citizens’ votes by up to 20 to 1— it could be said that the standard countermajoritarian paradigm of judges overruling democratically elected officials needs revising. Indeed, the reaction among the public and the media to the Court’s reapportionment decisions was almost uniformly positive.⁴⁶⁹ Opinion polling by Gallup indicated that the public approved of the reapportionment rulings by a margin of two to one.⁴⁷⁰ Public reaction to the decision in the United States suggested that the Court had anticipated the public mood and was met with “broad approval by the American public”⁴⁷¹. Friedman notes that “the very popularity of the reapportionment decisions belied any perception that legislative bodies were reflecting popular will, and that the courts were not.”⁴⁷²

⁴⁶⁴ Smith, p. 270.

⁴⁶⁵ Richard Hodder-Williams, *The Politics of the US Supreme Court*, (London: Allen & Unwin, 1980), p. 126.

⁴⁶⁶ Ely, p. 121.

⁴⁶⁷ Thomas Jefferson, 'Notes on the State of Virginia, 1781', in *The Avalon Project*, (Yale Law School, 2008).

⁴⁶⁸ See *supra* note 417.

⁴⁶⁹ See Friedman, 'Countermajoritarian Difficulty Part Five', p. 207.

⁴⁷⁰ Smith, p. 233.

⁴⁷¹ Friedman, 'Countermajoritarian Difficulty Part Five', p. 206.

⁴⁷² *Ibid.* p. 221.

Criticisms of the decision such as that of U.S. Senator Everett Dirksen— that “the will of six men on the Supreme Court” was contrary to the will of the people—were rare, because in Friedman’s words “probably they were not true”.⁴⁷³ Explaining why, Friedman adds

The judiciary apparently was the only place to go when malapportionment had locked out the will of the people, who could not get politicians, anxious to retain their employment, to solve the problem themselves.⁴⁷⁴

Even an initial critic of the decision such as Louis Jaffe conceded that

At least some of us who shook our heads over *Baker v Carr* are prepared to admit that it has not been futile, that it has not impaired, indeed that it has enhanced, the prestige of the Court. It has been a peculiarly popular opinion.⁴⁷⁵

Overall, it is hard to disagree with Robert McCloskey’s view that the Court “happened to hit upon what students of public opinion might call a latent consensus.”⁴⁷⁶

The reapportionment cases and the decisions also highlight deep tension between national and local majorities that have been discussed in previous chapters. However, they also demonstrate the counter-intuitive relationship between majority rule and individual rights. The reapportionment cases restored majority rule in the United States in the interests of democracy. Yet that ruling was based on the principle that every individual’s vote must count the same as every other person’s. Ostensibly the court proclaimed the value oriented principle of equal representation; yet the decisions in the reapportionment cases were also fundamentally a corrective intended to instill the principles of equality into the participatory processes of representative government. In this respect the reapportionment decisions also reflected the principles of footnote four. As Dixon eloquently put it in a passage that was included in Justice Ginsburg’s ‘Madison Lecture’:

The ultimate rationale to be given for *Baker v Carr* and its numerous progeny is that when political avenues for redressing political problems become dead-end streets, some judicial

⁴⁷³ Ibid. p. 208.

⁴⁷⁴ Ibid.

⁴⁷⁵ Louis L Jaffe, ‘Was Brandeis an Activist-the Search for Intermediate Premises’, *Harv. L. Rev.*, 80, (1966), 991.

⁴⁷⁶ McCloskey, p. 266.

intervention in the politics of the people may be essential in order to *have* any effective politics.⁴⁷⁷ (emphasis in original).

It is perhaps unsurprising that Justice Ginsburg, whose dissent in the affirmative action case *Fisher v University of Texas at Austin*⁴⁷⁸ was based on footnote four⁴⁷⁹, would also see the decisions in *Baker* and *Reynolds* through the participatory prism of Harlan Stone's opinion.

Running counter to some conventional understandings of constitutionalism that what is good for democracy is bad for rights, in the reapportionment cases the Court instead saw a more symmetrical relationship, where the rights of all citizens were more likely to be undermined when representative democracy was malfunctioning and treating citizens unequally. The reapportionment cases illustrate that the standard assumption that constitutionalism and democracy are mutually antithetical does not reflect the more complex interdependence that exists between them. Democracy has tended to empower rights in America, but local variations in value differences meant that in certain places they were antithetical to one another. Thus, *Carolene Products* footnote four speaks directly to the dangers of political ossification and the circumstances under which the courts had a role to play in protecting individual rights when normal political channels had become dysfunctional. Constitutionalism, through its manifestation in judicial power, can have a restorative effect on democracy rather than debilitating it.⁴⁸⁰ This was also reflected in Justice Jackson's remarks, cited by Archibald Cox during oral arguments in *Baker*. Ending that political ossification might, according to Bickel, have been achieved simply through the Court's ruling in *Baker* if it prompted state legislatures to finally take action.⁴⁸¹ That was not sufficient, however, for an American constitutionalism where every person's opinion has to be able to form a majority.

⁴⁷⁷ Robert Galloway Dixon, *Democratic Representation: Reapportionment in Law and Politics*, (New York: Oxford University Press, 1968), p. 8. Cited in Ruth Bader Ginsburg, 'Speaking in a Judicial Voice', *NYUL Rev.*, 67, (1992), 1207-08.

⁴⁷⁸ *Fisher v University of Texas at Austin*, No. 11-345 (2013).

⁴⁷⁹ Lincoln Caplan, 'Ruth Bader Ginsburg and Footnote Four', in *The New Yorker*, (New York: Condé Nast, 2013).

⁴⁸⁰ As Issacharoff puts it, "...Judicial intervention against the malapportioned deformities of the electoral process could be justified as an example of solicitude for the 'discrete and insular' outcasts from the broader polity." Issacharoff, 'Constitutional Courts and Democratic Hedging', p. 963.

⁴⁸¹ Bickel, pp. 196-97.

5.7 Conclusion

One lesson from the malapportionment cases is that when representative rights are restricted then democracy becomes an empty vessel. The reapportionment cases are useful because they highlight how the Supreme Court's writ is all powerful in the legal / institutional space and in those limited areas of communal activity that federal law and the Constitution gives it jurisdiction in. While the decisions in *Baker v Carr* and the other reapportionment cases corrected a deep problem with voter exclusion and restored the representative nature of U.S. representative democracy⁴⁸², they did not reconcile the fundamental value differences between rural and urban inhabitants that caused malapportionment. The Court's decision extended to the political sphere where it was obeyed as state legislatures across the country complied with it. However, its capacity to improve the quality of the civic space—where the relationship between citizen and state matters the most—was limited.

The schism between America's broadly idealistic constitutional values and its often unscrupulous political values is clearly manifested in the reapportionment cases. The Supreme Court's intervention in the reapportionment of electoral districts had a seismic effect on politics. Theodore Olson, U.S. Solicitor General from 2001-2004, recently commented on the positive legacy of *Baker* and the other reapportionment decisions. "It is hard to imagine what this country would be like, or what political crises we may have had because of the continued exasperation of that system of smaller numbers of people having greater concentrations of power."⁴⁸³

Among the writing of the founders, particularly Hamilton and Madison, it is hard to discern any desire for a concept of republican government based on numerical equality. Yet in the United States after *Carolene Products* and *Brown v Board of Education*, and after the beginning of the civil rights era, it seemed unthinkable for representation to be based on anything other than political equality, as Justice Douglas noted in *Gray*. Grossly unequal representation is now recognised as being unconstitutional. The recent case of *Evenwel v Abbott* in which the Court unanimously upheld the principle of 'one person one vote' (and not 'one voter one vote'*) against a

⁴⁸² Until gerrymandering was able to reclaim some of the gains made from the striking down of numerical reapportionment.

⁴⁸³ 'Baker v Carr', in *Supreme Court Landmark Cases*, (2015).

* The distinction is an important one. In *Evenwel*, the Texas voter of that name who filed suit challenged the apportionment of legislative districts on the basis of total population, as has been the norm, and requesting instead an apportionment based only on 'registered voters'. A change to such a system would have resulted in poorer urban areas (where there are fewer registered voters but large populations) getting

challenge from a Texas voter illustrates how efforts by some vested interests to skew the principles and structure of representative government against those with less wealth and influence have not abated. Gross inequalities in political representation as existed in the United States before the reapportionment decisions are particularly dangerous in a democracy, potentially leading to a crisis of confidence with wider political institutions, with all the concomitant risks to political stability that implies.

Today, gerrymandering has replaced unequal numerical representation of voters as the primary instrument of malapportionment. In the 2012 mid-term elections, Democrats received 1.5 million more votes than Republicans nationally, but gained only 8 house seats, leaving the GOP's house majority of 33 seats intact.⁴⁸⁴ The effects of gerrymandering are pervasive since, by drawing boundaries favourable to one party, the centre ground of American politics has collapsed. Solving gerrymandering would require the Supreme Court to leap into the political thicket once again, but without the aid of either a fundamental constitutional value such as equality or a principle such as one person one vote which most voters can appreciate the rationality of. A solution would more likely require a process driven approach, perhaps adopting the logic behind reapportionment laws passed by Congress in the nineteenth and early twentieth centuries requiring "compact districts of contiguous territory"⁴⁸⁵. Perhaps the best solution to gerrymandering might be to take the responsibility for electoral districting out of the hands of state legislatures and political machines altogether as six states have done with the creation of non-partisan commissions.⁴⁸⁶ Without such action, Republicans will continue to do well in state and House elections, while the Democrats will be more competitive in the Senate and presidential elections – where apportionment is irrelevant.

The role of the Court in upholding the Constitution has, as seen in this chapter and the last, generally made it a useful proxy of federal power. This, I have argued, has been less about the Court pro-actively acting to advance federal goals and more about a correlation of interests and values, and a higher propensity for malfeasance on the part

fewer representatives, and wealthier suburban and rural areas getting more representation.

⁴⁸⁴ In Ohio, 52 percent of the vote went to Republicans in the 2012 but they carried 12 of the state's 16 house seats, or 75 percent of the seats. See 'REDMAP Summary Report', (2013).

⁴⁸⁵ Charles W Eagles, *Democracy Delayed: Congressional Reapportionment and Urban-Rural Conflict in The 1920s*, (University of Georgia Press, 2010), p. 30.

⁴⁸⁶ Arizona, California, Idaho, Iowa, New Jersey and Washington have created non-partisan commissions to deal with reapportionment, but in some of these states the legislatures still play a role in the process, even if they are not drawing the district lines.

of the state legislatures, making judicial intervention more likely. The Court's 5-4 decision in 2013 to invalidate key parts of the 1965 Voting Rights Act represents both a seismic departure from this support for federal action, and a repudiation of the principles contained in *Carolene Products* footnote four. The majority opinion in *Shelby* noted that "the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions."⁴⁸⁷

Unlike the decisions of the German Constitutional Court to strike down thresholds for electoral success *because* they prevented all Germans from exercising their vote and participating in a representative democracy, the Supreme Court in *Shelby* defended the interests of the States in striking down parts of the VRA designed to protect the right of individuals *to* participate in the democratic process. Apart from invalidating Congress's decision in 2006 to re-authorise the VRA for an additional 25 years⁴⁸⁸, the Court reversed the progressive development towards equality and human dignity that marked the century between the end of the Civil War and the passing of the VRA in 1965. More significantly, the Court broke the link between human dignity and the right of all individuals to participate in the political process which characterised the reapportionment decisions and the VRA itself.

As argued in Chapter 3, America's liberty oriented constitutionalism has tended to work to formalise existing value changes as a result of political activity in civil society. This was the case with *Brown v Board of Education*, the reapportionment cases, and the 2015 ruling on gay marriage. None of these cases are ones where the Court acted counter to existing majority sentiment in the United States.⁴⁸⁹ Rather, it declared, to paraphrase Justice William Brennan, what it considered to be "the community's interpretation"⁴⁹⁰. One might say, then, that the Court's role merely reflects and confirms Tocqueville's observation about social change in America, that once the majority has decided to embrace a new social principle, be it desegregation or gay marriage, the minority tends to fall in and accept that new value.⁴⁹¹ The Court can play a role then in helping society make the transition from minority to majority acceptance of the new value. In the American reapportionment cases we can discern an account of

⁴⁸⁷ *Shelby County, Alabama v Holder, Attorney General et al*, No 12-96 (2013), p. 2.

⁴⁸⁸ The vote was 390 to 33 in the House, unanimous in the Senate.

⁴⁸⁹ See *supra* note 266.

⁴⁹⁰ Brennan Jr, p. 25. Writing in 1985, Brennan observed that "the act of interpretation must be undertaken with full consciousness that it is, in a very real sense, the Community's interpretation that is sought."

⁴⁹¹ De Tocqueville and Renshaw, p. 103.

constitutionalism which shows that social forces were hugely important in driving some political action. However, the self-interest of legislators in keeping their jobs meant that the federal courts were the only possible source of relief.

Given its undisputed powers in the Basic Law, the *Bundesverfassungsgericht* would not have had to justify its role in restoring majority rule the way the Supreme Court had to. The post-war recovery of Germany is widely seen as a political and economic miracle. Yet it was a miracle which was neither pre-ordained nor particularly likely given the assault on constitutional democracy by the Nazis and the distinct lack of affection among Germans for the new constitutional order in the early years of the Federal Republic. Few would have predicted in the early 1950s that the institution of the German state which would do most to underpin the country's nascent democracy over the next seven decades would be the *Bundesverfassungsgericht*.

Given Germany's traumatic past, German constitutionalism has been more inclined towards 'less' participation than more. In the early 1950s what was perhaps most needed in Germany was political stability and a renewed faith in law. The development in German constitutionalism through which the *BVerfG* restored that faith was controversial for it created exactly the kind of Aristotelian polis that Böckenförde was concerned about. This value order broke down the barrier between public and private law, and declared that individuals were not isolated human beings but realised their dignity and freedom in relation to their role in the community. Democracy in the German context did not, therefore, arise out of liberty as in the American view, but arose out of fundamental rights including human dignity, which it is the state's duty to protect. The Court's role in stabilising German democracy and restoring its trust in law will now be assessed.

Chapter 6 - The Democracy Training Programme

We got democracy from you, as a gift I would say, in the forties and fifties. But I'm not sure if these democratic attitudes are very well established in my country. We Germans always have to practice democracy—we're still on the training programme. (Dirk Kurbjuweit)⁴⁹²

Neither democratic or constitutionalist theory requires that a polity quietly submit to assassination. (Walter Murphy)⁴⁹³

Constitutions enjoy stability not only when any possible destroyers are at a distance, but sometimes just because they are close by; for through fear of them men keep a firm hold on their own constitution.⁴⁹⁴ (Aristotle)

⁴⁹² George Packer, 'The Quiet German', in *The New Yorker*, (New York, 2014).

⁴⁹³ Murphy, *Constitutional Democracy : Creating and Maintaining a Just Political Order* p. 524.

⁴⁹⁴ Aristotle, T. A. Sinclair, and Trevor J. Saunders, *The Politics*, (Harmondsworth: Penguin, 1981), p. 325.

In the previous two chapters the Supreme Court's developing jurisprudence recognised, often belatedly and tentatively, the changing concept of equality within U.S. society. Only after 1938 with *Carolene Products* footnote four and the later emancipatory decisions of the Warren Court, did its 'formalising' decisions catch up with, and occasionally overtake, the pace of societal change. By contrast, the role of the Federal Constitutional Court or *Bundesverfassungsgericht* (*BVerfG*) in shaping the development of fundamental constitutional values and moving away from the legal positivism of the Weimar Republic has been anything but tentative. The emergence of the Basic Law's 'objective value order' as enunciated by the *BVerfG* can be seen as an attempt both to create a basis for stability by entrenching the fundamental values of human dignity and the free democratic basic order at the centre of the constitutional order, while also allowing a space for societal renewal and for liberal democratic values to take root in Germany. As I will address in Section 6.4, this balance between stability and renewal has tilted over time from the former's emphasis on the 'militant democracy' to, beginning in the 1970s, the greater emphasis of the latter on democratic renewal and a rejection of any sense of a "timeless validity"⁴⁹⁵ in constitutional interpretation.

Of particular interest is how the country's constitutional recovery was placed almost entirely in the hands of a small group of constitutional court justices in the small German city of Karlsruhe. Their mandate empowered them to restrict democracy in order to preserve it against the uniquely anti-democratic conditions which it faced at its inception. When the Court began hearing cases in 1951, Nazi sympathisers were again on the political march and in state elections that year far right parties won between 7 and 11 percent of the vote.⁴⁹⁶ Even as the German Parliament, the *Bundestag* was appointing the first justices to the *BVerfG*, Konrad Adenauer's new government considered asking it to ban the largest far right party, the Socialist Reich Party (SRP).⁴⁹⁷ German constitutionalism as it emerged from the decisions of the *BVerfG* has increasingly exerted huge influence over the interpretation of constitutional values and the power balance between legal and political institutions. This influence ensured that the role of the *BVerfG* in the development of German constitutionalism after 1949 would be one of

⁴⁹⁵ *Life Imprisonment Case*

⁴⁹⁶ Collings, p. 2.

⁴⁹⁷ *Ibid.*

entrenching the values of democracy and human dignity within the constitutional order, while providing a stable basis for those values to take root in German society.

This chapter will assess the theoretical, historical and jurisprudential context within which German constitutionalism has mediated the competing imperatives of stability and renewal. Chapter 7 will assess how in practice the *BVerfG* has intervened in Germany's political processes and why, to some, it has become the guardian of German democracy. I will begin by firstly addressing the constitutional challenges faced by the Federal Republic of Germany⁴⁹⁸ (hereafter Germany or FRG) after 1949 and the perceived need to create a more resistant constitutional culture than was the Weimar Republic. The theoretical and jurisprudential underpinnings for German constitutionalism will be considered in this chapter with reference to the higher law basis of the Basic Law as a charter of justice which rejected legal positivism and which was encapsulated in the natural law thinking of Gustav Radbruch. This created a constitutional tableau in which the Court began to be seen as “a necessary precondition—and not as an institutional threat—to democracy”⁴⁹⁹. I will then assess the *BVerfG*'s objective value order which created the idea of the ‘image of man’ in the Basic Law where the dignity of the individual was bound to their role in the community. Ernst-Wolfgang Böckenförde's critique of this Aristotelian polis view which was examined in Chapter 3 raised the question of whether the Court's objective value order was sufficient to maintain liberal democracy without some other ‘internal bonding force’. In Section 6.7, I will assess the crucial role of law as just such a value which both underwrote the *BVerfG*'s authority and provided Germany with a necessary breathing space for liberal constitutional values to develop.

6.1 Creating a Constitutional Culture

Jeremy Waldron's observation that “it is not conceptually impossible for a democracy to vote itself out of existence”⁵⁰⁰ seems almost ahistorical given the experience of the Weimar Republic. Germany during the 1920s and 1930s remains the classic example of what can go wrong in a democratic system when there are insufficient constitutional safeguards in place. Germany was a constitutional state in the 1920s, and the tradition of the *Rechtsstaat* in German jurisprudence was strong; it was

⁴⁹⁸ West Germany will be referred to as ‘Germany’. East Germany will be referred to as the German Democratic Republic (GDR).

⁴⁹⁹ Collings, p. 1.

⁵⁰⁰ Jeremy Waldron, ‘Precommitment and Disagreement’, in *Constitutionalism : Philosophical Foundations*, ed. by Lawrence A. Alexander (Cambridge ; New York: Cambridge University Press, 1998), p. 272.

also, as Martin Amis put it, “the most highly educated society there had ever been on Earth.”⁵⁰¹ Why this cultured and educated society with its belief in the law governed state did not translate into a population and lawyer class more willing to challenge the National Socialist assault on constitutional democracy is still the historical and jurisprudential elephant in the room.

The National Socialist onslaught on the Weimar constitution illustrated how prescribed constitutional methods could be used by politically repellent ideologies to dismantle constitutional democracy from within. The German people in 1945 may have become disillusioned with the Nazis after 12 years of a police state and six years of total war, but a plurality of voters had elected the National Socialists freely according to the provisions of the liberal democratic Weimar constitution in July 1932.⁵⁰² Even as late as 1939, one German writer suggests that “Hitler would still have been overwhelmingly re-elected, even in a free and secret poll.”⁵⁰³ This point mattered, both as salutary warning about the dangers of unconstrained majority will and an orientation point for Germany’s emerging post-1949 constitutionalism and its militant democracy (*streitbare Demokratie*).

Count One of the indictment at Nuremberg emphasised how the German people had been repressed by the Nazis.⁵⁰⁴ The desire not to be seen to blame the German people for supporting Hitler was seen as important for allowing Germany and its political institutions to recover and stabilise. However, the fact remains that while many groups and hundreds of thousands of Germans were repressed by the Nazis,⁵⁰⁵ there was still broad support for the regime till the end of the war. Even after the establishment of the Federal Republic in 1949, polling data indicates a longing for previous regimes. In a speech before the *Bundestag* in 2014 to celebrate the 65th anniversary of the Basic Law, Dr Navid Kermani cited a representative survey of Germans conducted in 1951 which asked when things had been best for Germans: 45 percent indicated the *Kaiserreich* (1871-1918), 7 percent indicated the Weimar Republic, 42 percent indicated the Nazi

⁵⁰¹ 'Martin Amis on His Latest Novel: The Zone of Interest', in *Charlie Rose*.

⁵⁰² The National Socialists emerged as the largest party winning 37% of the vote and 230 seats in the *Reichstag*.

⁵⁰³ Norbert Frei, *Karrieren im Zwielficht : Hitlers Eliten Nach 1945*, (Frankfurt: Campus, 2001), p. 303.

⁵⁰⁴ Avalon Project, 'Nuremberg Trial Proceedings Vol. 1: Indictment Count One', (Lillian Goldman Law Library, 1945). “Instill fear in the hearts of the German people” (‘Consolidation of Control’ Section B); “In order to make the German people amenable to their will.” (‘Consolidation of Control’ Section E).

⁵⁰⁵ In 1937, half a million citizens were convicted by German courts for political opposition to the Nazis. 'Himmler: The Decent One', in *Storyville*.

period, but only 2 percent opted for the newly established Federal Republic.⁵⁰⁶ While this poll did not ask about support for Hitler or the National Socialists, the overall picture painted is of a population longing for any constitutional regime but the FRG. The potential challenge this environment posed for democracy and for constitutionalism was clear.

When the details of a new German constitution were being debated and discussed by the Parliamentary Council in 1948 and 1949, some called for the Weimar Constitution to be revived, leading one member to observe that “a democracy which allows a tyranny to emerge from its midst with so little resistance, does not deserve being recreated for a second time.”⁵⁰⁷ Correcting these deficiencies in the post-war period emphasised a focus on two areas which were seen as the weak point of the Weimar Republic: 1. Bullet-proofing the constitutional structure through the dispersal and limitation of the powers of public authority; 2. Placing the fundamental rights of the individual at the heart of the constitutional order so that their rigorous application and protection in law became the *sine qua non* of all organs of power within the West German state.

Following the end of the war, free elections were instituted by the allies at a local level as early as January 1946 before democratic parliaments were created at the *Land* (state) level a year later.⁵⁰⁸ Thus, as with the United States, the formation of the Federal Republic arose from a system of functional democratic accountability at the state level. The importance that the German founders attached to the federal and democratic structure of the state is reflected in the unamendable articles dealing with the “division of the Federation into *Länder* [states]” and the “democratic and social” character of the Federal Republic.⁵⁰⁹ Under the Basic Law power is divided horizontally within the federal state itself, and then divided again vertically by giving the individual German states a formal role in the national government,⁵¹⁰ a structural feature which is absent in the American model.

⁵⁰⁶ Navid Kermani, 'Rede von Dr. Navid Kermani zur Feierstunde 65 Jahre Grundgesetz', (Berlin: Deutscher Bundestag, 2014).

⁵⁰⁷ Elmar M. Hucko, *The Democratic Tradition : Four German Constitutions* (Leamington Spa: Berg, 1987), p. 68.

⁵⁰⁸ Ibid. p.63.

⁵⁰⁹ See Articles 79(3) and 20.

⁵¹⁰ The German states are represented in the upper house of the German parliament, the *Bundesrat*. Prior to the ratification of the Seventeenth Amendment in 1913 U.S. senators were appointed by the states, undoubtedly giving them considerable influence. However, that is different to them having a formal role

The overwhelming focus on the deficiencies of the Weimar constitution by the Parliamentary Council could not conceal uncomfortable questions over the role of the German people in failing to support constitutional democracy. As Hucko put it,

Looking back on the Nazi period, it was the German people who had failed in 1933, rather than the Weimar Constitution, and the concept of failure would appear to be more appropriate in this respect than the notion of guilt.⁵¹¹

Blaming Weimar for what may also have been the failings of the German people was possibly the only serious political option in a society attempting to get back on its feet.⁵¹² Discussion of collective guilt (*Kollektivschuld*) was postponed for the sake of political, societal, and constitutional reconstruction. “Engaged democrats,” writes Forner, “rejected a uniform German guilt while exhorting fellow Germans to consider the degrees and modes of their own responsibility.”⁵¹³

If it was simply failure rather than guilt, then the question for Germany’s founders became how might the institutions of the Basic Law be structured more resiliently, and its values disseminated more effectively in German politics and society. Even with an apparently formidable constitutional structure in the form of the Basic Law and the elevation of rights to the summit of the new order, these remained necessary but not sufficient conditions for liberal democratic constitutionalism to take root in German society. Given the failures of Germany’s previous liberal constitutions, particularly Weimar and that of 1849, the question inevitably turned to which features of those constitutions could be resurrected and in which forms.

Although the impoverished state of the German economy in the immediate post-war period can hardly have helped, the idea that there was a political dimension to the longing among Germans for the *Kaiserreich* and Third Reich periods is also borne out by other sources. The opinion poll data also matches historical accounts of the wide variance between the more liberal democratic views of German elites in politics, the judiciary and the arts in the immediate post-war period, and the less enlightened views of segments of the German population. According to the historian Gitta Sereny, “the

in the federal government as the German states do in the *Bundesrat*.

⁵¹¹ See for example Hucko, p. 62.

⁵¹² See for example Jasper’s seminal study on the question of the culpability of Germans for the Nazi period. Karl Jaspers, *The Question of German Guilt*, (Fordham Univ Press, 2009).

⁵¹³ Sean A Forner, *German Intellectuals and the Challenge of Democratic Renewal: Culture and Politics After 1945*, (Cambridge University Press, 2014), p. 62.

majority of Germans wanted nothing more than that all trials, all writings, films and plays about that period would stop.” It was, she observes

[the] intense preoccupation with their country’s past of leading writers, artists, thinkers, the judiciary and, yes, also of politicians in those early years, and their ability to maintain their convictions against the pressures of large sections of the public, which even more than the Marshall Plan and the resultant *Wirtschaftswunder*, has been the source of Germany’s remarkable moral recovery.⁵¹⁴

Sereny’s account highlights the crucial division in German society which produced the Basic Law. It was the country’s elites rather than the constituent power of the German people that dragged Germany into the post-war constitutional light. However, in 1949 the conditions looked intensely inhospitable for constitutional democracy. The challenge for the FRG’s founders, politicians, and judges was how to strengthen the institutions of the new constitutionalism and build the kind of support for them within German society that was completely absent during Weimar.

The eventual emergence of German liberal democracy in the decades after the destruction of the Nazi state faced unprecedented challenges, reflecting historic ebbs and flows in the acceptance of constitutionalism in Germany.⁵¹⁵ German liberals had been attempting to create a constitutional democracy for a century but had been beaten back by conservatives in 1849, then Bismarck, then Kaiser Wilhelm II and, finally, Hitler.⁵¹⁶ While the tradition of the *Rechtsstaat* ran deep, instilling in Germans a profound respect for law, this did not extend to politics which was generally regarded with a mixture of detachment, if not contempt. This distaste for politics and reverence for law among ordinary Germans, even prior to the Nazi period, partly explains the relatively early respect accorded to the *BVerfG* after 1951.⁵¹⁷

Although the threats posed to German constitutionalism in 1949 were more acute than those America faced in 1789, both polities had to deal with the challenge of

⁵¹⁴ Sereny, *The German Trauma : Experiences and Reflections, 1938-2001*. pp.58-59.

⁵¹⁵ These ebbs and flows reflect German constitutional history going back to the short lived liberal constitution of 1849 in which the first ever catalogue of rights of the German people was enacted. Many of these rights including freedom of speech, freedom of association, civil and human rights formed the basis of the Weimar Constitution and the Basic Law of 1949. See Hucko.

⁵¹⁶ Although not considered here, the *Sonderweg* thesis that Germany chose a special path between 1848 and 1933 which did not match that of other comparable European states like France or Britain is one explanation given for the failure of democracy to take root.

⁵¹⁷ See *infra* note 592.

creating a supportive constitutional culture. As noted in the previous chapter, the challenge for Madison and the other founders, as Bellah notes, had been the particular problem of developing “public virtues in democratic citizens.”⁵¹⁸ The Constitution was designed to bring this about through the instrumentality of checks and balances to offset “the centrifugal and anarchic tendency of competitive individual and local self-interest,”⁵¹⁹ and so foster what Madison called the “permanent and aggregate interests of the community.” In 1949, as highlighted by the polling evidence earlier, the Basic Law had nothing to fall back on by way of a public virtue or a supportive culture. Reflecting on the failure of the previous German constitutions, Hucko writes:

Basic rights, even those which have been enshrined in a constitutional document, require open breathing spaces where political life can organise and express itself. Above all, these must be defended and fought for day after day.⁵²⁰

Although Hucko’s words were inspired by the unfulfilled promise of the German constitution of 1849 and certainly speak to the need for vibrant political processes, they also speak to the need for a civic space where the people can through their representatives shape and give meaning to constitutional values. Only the untested resilience of the *streitbare Demokratie* offered the possibility of a breathing space for a supportive constitutional culture to develop, and guard Germany from a re-run of its 1932-45 experience.

6.2 The Basic Law as a Charter of Justice

In reaction to the assault on human dignity and democracy by the National Socialists, the founders of the Federal Republic “drew deep upon German tradition to found the legal order on moral and rational idealism, particularly that of Kant and Hegel.”⁵²¹ Treating individuals always as an end in themselves and never as a means to an end was the most fundamental Kantian precept to undergird the Basic Law. Perhaps more significantly, the Basic Law includes a provision that makes international law an integral part of German federal law, thus signifying the country’s rejection of absolute sovereignty and its embrace of international human rights values, and a desire to play an

⁵¹⁸ Bellah, p. 254.

⁵¹⁹ Ibid. p. 255.

⁵²⁰ Hucko, p. 21.

⁵²¹ Eberle, p. 7.

active role in European integration.⁵²² The fundamentally normative character of the Basic Law is noted by Kommers and Miller.

Germans no longer understand their constitution as the simple expression of an existential order of power. They commonly agree that the Basic Law is fundamentally a normative constitution embracing values, rights and duties. That the Basic Law is a value-oriented document — indeed, one that establishes a hierarchical value order — is a familiar refrain in German constitutional case law⁵²³

The Basic Law was drafted by The Parliamentary Council which met in 1948 while the country was still in flux and going through the process of “de-Nazification”. Hans Kelsen, seen as the founder of the Austrian Constitutional Court, was also involved in drafting the proposals at the Parliamentary Council for a new constitutional tribunal.⁵²⁴ It was the ideas of American and Western constitutional government which “shaped the political ideas of the 70 men and women who produced the Basic Law in Bonn in just under 9 months.”⁵²⁵ Here, the experience of where democracy can go awry from the 1930s permeates practically every section of the Basic Law. Brenner writes: “The Basic Law clearly rejects direct democracy, regardless of the—at least ostensibly—greater potential it has for legitimation.”⁵²⁶ Instead, as Thornhill notes, “the constitution clearly construed state legitimacy as arising from a modification of classical concepts of the democratic-legal state to include principles of material equality.”⁵²⁷ Achieving such a complex balance between individual rights, the collective agency of the people, and the state after the unfulfilled promise of Germany’s previous constitutions demanded that the new constitutional order be based on the one institution which might still be able to command the respect of the German people: the law. In this vein, Stern writes:

Following the American constitutional tradition, the Basic Law provided from the very beginning a state system subject to law. The Constitution was adopted as a law of paramount obligation to

⁵²² A.E. Howard, 'Traveler From An Antique Land: The Modern Renaissance of Comparative Constitutionalism', *Va. J. Int'l L.*, 50, (2009), 17.

⁵²³ Kommers and Miller. p.45.

⁵²⁴ Ibid. p. 7.

⁵²⁵ Stern, p. 18.

⁵²⁶ Brenner, pp. 135,39.Cited in Kommers and Miller, pp. 773-74.

⁵²⁷ Chris Thornhill, J., *A Sociology of Constitutions : Constitutions and State Legitimacy in Historical-Sociological Perspective*, (Cambridge ; New York: Cambridge University Press, 2011), p. 336.

which all other law was – and is – subordinate. It has perhaps become more than anywhere else *the* legal rule of legal rules.⁵²⁸

The emphasis on legal mechanisms and the judicial role in preserving and shaping the post-1949 German constitutional order and its separation of powers system allows individuals, state organs, and political parties to file constitutional complaints with the *BVerfG* when they perceive their rights have been violated by state authority. As with the Supreme Court’s jurisprudence with *Carolene Products* footnote four designed to ensure more searching judicial scrutiny where democratic processes and the political rights of minority groups were restricted, the *BVerfG* sees this constitutional complaints process in the German system as particularly crucial for the protection of minority parties in Parliament and to ensure important checks on government power. The constitutional complaint mechanism presented the *BVerfG* with the opportunity to greatly expand its own authority in a 1958 case⁵²⁹ where it articulated its “objective order of values” which permeates the country’s entire constitutional order. This is what Kommers calls “the gloss” that the Court has put on the text of the Basic Law.⁵³⁰ The enunciation of the Court’s value order was a significant development in German constitutionalism, and signified that *human dignity* and the free democratic basic order represented the most fundamental values of society.⁵³¹

6.3 Higher Law and Pre-Constitutional Rights as a Democratic Precondition

The theoretical sources and normative principles which contributed to the framing of the Basic Law continue to play a role in its interpretation, while also helping us understand how the *BVerfG* perceives the role of the individual within the constitutional mix. Partly, these principles are “rooted in the dialectic between the liberal, socialist, and Christian natural-law traditions that shaped the original document”, but they are also derived from what the Court calls “supra-positive principles of law” that “bind legislators and other political decision makers”.⁵³² Within the German constitutional order these principles contribute to what Kommers and Miller describe as “communitarian values” which are “suggestive of aspects of the Aristotelian polis as well as the early American traditions of civic republicanism.”⁵³³

⁵²⁸ Stern, p. 20.

⁵²⁹ See *infra* note 577.

⁵³⁰ Donald P Kommers, 'German Constitutionalism: A Prolegomenon', *Emory LJ*, 40, (1991), 858.

⁵³¹ When the values of dignity and democracy conflict, dignity will not always come out on top as in *Der Spiegel Case*, 20 BVerfGE 162 (1966). See *infra* note 568

⁵³² Kommers and Miller. p.70.

⁵³³ *Ibid.* p.46.

In signifying the identity of the new order, those who created the Basic Law had, as Kommers and Miller note, “given up on the old positivist idea that law and morality – and justice are separate domains. Constitutional morality would now govern both law and politics.”⁵³⁴ Escaping from legal positivism meant that the Basic Law became a fundamental charter of justice. Legality would now be measured against supra-positive principles of justice. The *Rechtsstaat* of the Basic Law is no longer an end in itself; it is a means which serves the ends of the *Verfassungsstaat* (constitutional state).⁵³⁵

Gustav Radbruch was the German legal thinker most responsible for setting out the distinction between positive law and justice. His 1946, article “Statutory Injustice and Suprastatutory Law”⁵³⁶ in which he provided a formula for dealing with the conflict between positive law and justice has been described as “one of the most important texts in 20th century legal philosophy”,⁵³⁷ while the importance of Radbruch’s formula has been confirmed by a number of judgements of both the German Constitutional Court and the German High Court⁵³⁸. Most significantly, in the context of the Basic Law, Radbruch’s view that certain higher principles of justice trumped positive law has been repeatedly cited by the *BVerfG*.⁵³⁹ The Radbruch Formula was primarily a response to the abuse of written law by the Nazis in the interest of injustice. As the German legal philosopher, Ralf Dreier, put it, “Radbruch’s formula was a reaction to Auschwitz.”⁵⁴⁰ The desire to embrace law but to reject positivism is reflective of an older German tradition of fidelity to the *Rechtsstaat* which meant more than simply the robotic adherence to statutory law associated with positivism. The Basic Law “represents a major break from this positivist tradition” by not conceiving of the state “as the source of fundamental rights. The core of individual freedom, like human dignity itself, is regarded as anterior to the state.”⁵⁴¹

As Kommers and Miller note, “the notion of ‘inviolable and inalienable’ rights is also sharply at variance with the spirit of earlier German constitutions, for the Basic

⁵³⁴ Ibid. 5.

⁵³⁵ Donald P. Kommers, 'German Constitutionalism: A Prolegomenon', (1991). p.846.

⁵³⁶ Radbruch, 'Gesetzliches Unrecht und Übergesetzliches Recht'.

⁵³⁷ Thomas Mertens, 'Nazism, Legal Positivism and Radbruch's Thesis on Statutory Injustice', *Law and Critique*, 14, (2003). p.277.

⁵³⁸ Ibid. p.293.

⁵³⁹ See for example *Equality Case*, 3 BVerfGE 225 (1953). Kommers and Miller note that in the Equality Case, the Court’s opinion “quotes with approval Radbruch’s affirmation of natural-law theory”. Kommers and Miller, p. 746.

⁵⁴⁰ Cited in Peter E Quint, 'Judging The Past: The Prosecution of East German Border Guards and The GDR Chain of Command', *The Review of Politics*, 61, (1999), 318.

⁵⁴¹ Kommers and Miller. p. 56.

Law is Germany's first national constitution to recognise the pre-constitutional existence of guaranteed rights.”⁵⁴² This post-war German view on the existence of pre-constitutional rights vested in people by nature has become fused with a post-1945 juridical-legal view where principles are often prioritised over written law or constitutional text:

In Germany, where the courts are by the constitution stated to be ‘bound to statute and to law’ (*Gesetz* and *Recht*), the reference to a body of law wider than the written statute law has been interpreted as requiring courts to expound fundamental principles implicit in the law, sometimes even in preference to the letter of the law.⁵⁴³

Rights are, thus, not derived from the *Rechtsstaat*, but their maintenance and protection requires, in the German legal mind, the presence of the order of legality (which the *Rechtsstaat* represents) at the centre of the constitutional order to maintain the coherence and unity of the system.

There is, however, a paradox in this view of rights as existing prior to the state. Rights are dependent on the state for their protection, but the post-1945 rights mindset emphasised the idea that rights were anterior to the state (in the sense of natural) and that their existence was not derived from the existence of the state. In Germany, the general post-1945 move towards legally recognised rights was fused with an older notion of the *Rechtsstaat* where human dignity and personal freedom were seen as being derived from rights laid down in law. The discontinuity with the pre-constitutional rights view is that the preservation of individual autonomy through the imposition of rules on the state “presupposes that the planning and acting that are to be protected must take place in a social environment.”⁵⁴⁴ The paradox is, thus, that rights in reality cannot be protected if the constitutional order that supports them collapses – this was one lesson from the Nazi period; but equally, the Nazi period also showed that rights could not just be seen to be derived from, or dependent on, state power.

In the Court's *Elfes* ruling of 1957, it further defined the nature of the value order and the constitutional implications of the move away from a German legal positivism that had too easily been used to equate law with justice. This would mean the Court's interpretations of the Basic Law, and of unwritten higher law principles, and

⁵⁴² Ibid. p. 44

⁵⁴³ McCormick and others pp.484-485.

⁵⁴⁴ Kay. p.21.

parliamentary statutes represent the final word on constitutional meaning. The Court's First Senate⁵⁴⁵ declared that under the Basic Law,

Laws are not constitutional merely because they have been passed in conformity with procedural provisions. They must be substantively compatible with the highest values of a free and democratic order, and must also conform to unwritten fundamental constitutional principles [...].⁵⁴⁶

The implications of this new *BVerfG* shaped understanding—that rights were anterior to the state and to democracy itself—for the new constitutionalism and for representative democracy itself were startling. This was not an American liberty oriented conception of rights. Rather rights and democracy were joined at the hip and could only be exercised in the social and political landscape created by the Basic Law, and by the *BVerfG*.

This was then the historical logical and the political imperative which shaped Germany's postwar constitutionalism. Maintaining stability was a key political goal as much as it was a legal one to allow the country's new constitutional institutions to become accepted. However, making democracy contingent on rights also meant defining the individual not as a lone isolated and free person—as in the U.S. conception of liberty—but as a person within the community. For reasons that will be explained in Section 6.6, the Court's decision in the *Lüth Case* of 1958 to declare that the Basic Law governed not only public law, but also private law, automatically brought private relationships within the scope of constitutional protection, while also shaping Germany's evolving conception of democracy.

6.4 The Stability Renewal Transition

The gradual transition from a constitutionalism of stability to one of renewal has been embodied in both the Court's interpretational methodology and in its conception, echoing Koopmans⁵⁴⁷, of how minority opinions can become a majority. Within German constitutionalism, the 'stability' dynamic is squarely embodied in the concept of the militant democracy which dominated the Court's jurisprudence in its first few decades. This was illustrated in cases which upheld the political status quo, such as when the Court upheld government raids on the offices of *Der Spiegel* magazine.⁵⁴⁸ By the 1970s

⁵⁴⁵ There are two senates within the *BVerfG*, with 8 justices on each.

⁵⁴⁶ *Elfes*.

⁵⁴⁷ See *supra* note 93.

⁵⁴⁸ See *infra* note 568.

this balance shifted tentatively towards renewal, with decisions that embraced the imperative of political renewal⁵⁴⁹, and rejected the idea that even architectonic principles such as human dignity could have eternal definitions⁵⁵⁰. Through decisions in the 1980s that favoured the Green Party and accelerated its integration into the German political system, the Court was seen to have become more unsympathetic to the oligarchical tendencies in Germany's established parties.⁵⁵¹

The problem that this ostensible transition from stability to renewal has raised is that it has seemingly been accompanied by a more opaque methodology and more erratic decision-making. While this transition towards renewal has been good for Germany's smaller political parties such as the Greens and opposition groups whose interests the Court has sought to protect, in other areas it has resulted in a weakening of the Basic Law's fundamental rights protections through the use of principles such as proportionality. Proportionality uses a means/ends test to evaluate any piece of legislation to decide the extent to which any subjective right (i.e. fundamental right) can be interfered with to realise an objective principle (i.e. a legitimate end of state power). The effect of the Court's use of proportionality—which assumes that no right is absolute and has to be circumscribed by duties—has attracted criticism among German legal circles because it gives unlimited discretion to the *BVerfG* to weaken fundamental rights.⁵⁵²

The tension between stability and renewal, and the paradoxical character of intrinsic values within German constitutionalism is highlighted by a famous opinion of the Court – *the Life Imprisonment Case*. Much like Justice Holmes' opinion in *Missouri v Holland*⁵⁵³, this illustrates a fundamental antipathy to any interpretation based on originalist or permanent understandings.

Any decision defining human dignity in concrete terms must be based on our present understanding of it, and not on any claim to a conception of timeless validity.⁵⁵⁴

⁵⁴⁹ *Official Propaganda Case*, 44 BVerfGE 125 (1977).

⁵⁵⁰ *Life Imprisonment Case*

⁵⁵¹ See *infra* note 678.

⁵⁵² The principle is used to “justify limits on democratic rights and fundamental freedoms”. See Kommers and Miller, p. 67. The Court's use of proportionality is merely one aspect of the larger critique of the Court by Schlink which will be assessed in Chapter 7. See Schlink.

⁵⁵³ *State of Missouri v Holland*.

⁵⁵⁴ *Life Imprisonment Case* (1977)

In the parlance of the *BVerfG*, then, even the architectonic principle of human dignity can never be absolute as a right because it depends on a conception of the individual as part of a social unit. This change is inexorably linked to the development of the Court's objective value order and its Aristotelian polis conception of German constitutionalism which effectively erodes the wall separating the private and the public spheres, and that between individual and community.

Yet this poses an ostensible disjuncture between the eternal commitment to human dignity in the Basic Law and the *BVerfG*'s declaration against any conception of a timeless validity when defining human dignity. The only way to bridge this gap is through context, interpretation and meaning, which for writers like Bernhard Schlink is the real problem.⁵⁵⁵ The danger becomes that a fundamental principle like human dignity—that the framers of the Basic Law intended should be a subjective right against state intrusion—can be interpreted out of existence through a balancing exercise. So clear were Germany's framers about the logic and premise of these principles that fundamental rights including human dignity were protected from constitutional amendment through their entrenchment under the eternity clause of Article 79. Given its protection under the eternity clause, there is clearly a problem if the Court can interpret human dignity to mean anything. This reflects the view of the Federal Republic's founders that human dignity was “the right that could ‘trump’ all other rights” and “was not open to any form of balancing test”.⁵⁵⁶

The whole point of the post-1945 codification of human rights and the concept of human dignity is that they were intended to draw a line in the sand; perhaps not so much a Fukuyama-esque end of history moment in terms of the triumph of liberalism, but certainly the idea that respect for the principle of fundamental human rights and human dignity are not negotiable.

6.5 An Objective Value Order

Philip Allott has called the Basic Law “the *fine fleur*, the *ne plus ultra*, of democratic rationalism, a pure distillation of long centuries of European constitutionalism.”⁵⁵⁷ Elmar Hucko echoes this when he writes: “the Basic Law has proved its worth. It is the fruit of a hundred years of German constitutional history,

⁵⁵⁵ Schlink, pp. 199-200.

⁵⁵⁶ Christoph Möllers, 'Democracy and Human Dignity: Limits of a Moralized Conception of Rights in German Constitutional Law', *Israel Law Review*, 42, (2009), 419.

⁵⁵⁷ Philip Allott, *The Health of Nations : Society and Law Beyond The State*, (Cambridge: Cambridge University Press, 2002).p.205.

combining with it the merits of the three previous constitutions, and at the same time avoiding their weaknesses.”⁵⁵⁸ The assertive value orientation of the Basic Law and its interpretation by the *Bundesverfassungsgericht* shapes every aspect of the constitutional order including the structuring of the institutions, the force of basic rights, and the relationship between the individual and society. The Basic Law is not a constitution which only has relevance in a court room when transgressions occur. Institutional and administrative elements of the German state measure official actions against what fidelity to the Basic Law demands. The principle of legality (*Gesetzmäßigkeit*) is important in German administration and helps ensure that government actions conform to the law and the constitution.⁵⁵⁹

The *BVerfG*’s enunciation of the Basic Law’s objective value order declared that a hierarchy of norms existed, with some more important than others. Thus, the value order is not merely an interpretational or balancing tool for the Court; the concept also imposes obligations on all institutions within the state to ensure that government actions are carried out in accordance with the constitution and with law. In analysing this value order and its implications for German representative democracy, of central importance are *human dignity* and the *free democratic basic order*. The value of human dignity implies a focus on how individual rights can be protected and realised within a context which includes the state, society and other individuals; the free democratic basic order value implies a focus on how popular sovereignty can be constrained both to protect individual rights and preserve the existence of the structure itself.

Inevitably, these two values sometimes come into conflict when human dignity and liberty must be balanced against the security and preservation of the free democratic basic order.⁵⁶⁰ In interpretational terms, the ‘objective order of values’ can be seen a ranking of values in terms of their importance — which the Court then uses as an interpretational framework when adjudicating cases. By identifying which values are at issue in a case and the relative weighting (in importance) of each value, the Court can use balancing principles such as ‘proportionality’ to come to a decision. The phrase ‘objective order of values’, like the word ‘proportionality’ does not actually occur in the Basic Law, yet according to the Court, those values exist as an objective reality in the

⁵⁵⁸ Hucko, p. 76.

⁵⁵⁹ Writing in the 1960s, Friedrich noted that Germans are “notoriously willing” to appeal to the administrative courts; and since these legally trained bureaucrats are concerned that any decision against their actions might carry “the implication of illegality”, there is generally a good deal of compliance. Carl J. Friedrich, *Trends of Federalism in Theory and Practice*, (London: Pall Mall, 1968), pp. 132-33.

⁵⁶⁰ See for example *Der Spiegel Case*. See *infra* note 568.

constitution in the form of values such as the ‘free democratic basic order’ and ‘human dignity’. The *BVerfG* is the final arbiter on whether any constraints on democratic process may be justified by the state such as when the Court determines the constitutionality of political parties or other threats to the ‘free democratic basic order’. The *BVerfG* is due to deliver its verdict in January 2017 on whether the far right neo-Nazi party the NPD is unconstitutional and will be banned.⁵⁶¹

Far from being a value neutral document, the Court has used the “objective value order” phraseology it created to interpret the Basic Law as being based on a particular vision of German society, a vision which the Court seeks to orient its rulings towards. The idea of the Court enunciating the existence of constitutional values of its own creation, which it then uses as a basis for further broad interpretations of the Basic Law may sound like a judicial tautology or constitutional chutzpah depending on one’s perspective. Carl Schmitt’s perspective, which will be assessed in Section 6.6, was even more hostile. As we will also see with some of the electoral threshold cases in Chapter 7 and its decisions in other areas, the *BVerfG* cites itself far more than it cites the Basic Law,⁵⁶² potentially raising methodological and interpretational concerns. The larger concern is that the Court’s rulings become understandable only through its own case law and its value order—and sometimes not even then—rather than the text of the Basic Law itself.

In the first few years of its existence, the *BVerfG* enunciated a conception of the person where their individual rights were inextricably linked to their role within their community. This has been a much repeated phraseology in the Court’s case law.

The image of man in the Basic Law is not that of an isolated, sovereign individual; rather, the Basic Law has decided in favour of a relationship between individual and community in the sense of a person’s dependence on and commitment to the community, without infringing upon a person’s individual value.⁵⁶³

Striking the correct balance between these two poles of ‘individual autonomy’ and the ‘interests of the wider community’ will, of course, often come down to judicial interpretation of the written, unwritten and pre-constitutional principles within the

⁵⁶¹ 'Urteil im NPD-Verbotsverfahren Fällt im Januar', in *Spiegel Online*, (2016).

⁵⁶² Collings, p. 302. See *infra* note 632.

⁵⁶³ *Investment Aid I Case*. Other important cases in which the Court has invoked its “image of man” idea include *Life Imprisonment Case*; *Mephisto Case*, 30 BVerfGE 173 (1971). Kommers and Miller note that these words have been oft repeated in the Court’s jurisprudence and identify “a polity that reminds Americans of Lincoln’s image of a fraternal democracy.” See Kommers and Miller, p. 70.

German constitutional order. Although the Court sees human dignity as the pre-eminent value of the Basic Law, it is a dignity which is realised most through the relationship between the individual and society. Most of the *BVerfG*'s jurisprudence and the effects of its pronouncements on German society arise out of the inter-relationship between the fundamental values of human dignity and the free democratic basic order.

There is a sense here of an older tradition of rights which is neither uniquely German, nor can it be said to be pre-political in a natural law sense. In the American tradition the preservation of individual autonomy through the imposition of rules on the state “presupposes that the planning and acting that are to be protected must take place in a social environment.”⁵⁶⁴ Similarly, Kommers writes that “any realisation of dignity implies a fusion of individual rights and social responsibilities.”⁵⁶⁵ As indicated in earlier chapters, the significant difference between how autonomy is shaped in the American and German contexts is the complete absence of a role for the state (at least originally) in the former, and the instrumental role of the state in the latter. As important as dignity is for one person, the achievement of this right cannot impinge on the dignity of others. This illustrates the extent to which the constitutionalism of the Karlsruhe justices implies a commitment on the part of individuals to see their own rights within a social and communitarian context which also considers the effect that the exercise of those rights will have on others. The effect of this emphasis on the social and communitarian context was profound, not least in how it reinforced the idea that democracy in the Basic Law could never be an end in itself. Democracy could only be legitimate if it respected fundamental rights.

6.6. Guarding the Constitution

Writing in the early 1990s, Steinberger observed that “politicians and political scientists understand representative democracy to be primarily the antithesis of direct democracy.”⁵⁶⁶ Despite Germany having a more powerful form of constitutional review than that in the U.S., democratic values occupy a central position within the Basic Law. This democratic principle is also entrenched in the unamendable Article 20 which states that “The Federal Republic of Germany is a democratic and social federal state.”

⁵⁶⁴ Kay, p.21.

⁵⁶⁵ Kommers, (1991).p.856.

⁵⁶⁶ Helmut Steinberger, 'Political Representation in Germany', in *Germany and its Basic Law: Past, Present, and Future: A German-American Symposium*, ed. by Paul Kirchhof and Donald P Kommers (Baden-Baden: Nomos, 1993), p. 121.

More than any other principle in the German constitution, the free democratic basic order is squarely rooted in the principle of the militant democracy. The concept of militant democracy does not speak to equality as much as to the survival of the *potential* for equality and dignity. Although the free democratic basic order and human dignity are the two architectonic principles of the Basic Law, dignity will not always emerge on top in a balancing exercise. In the *Spiegel Case*⁵⁶⁷ from the 1960s, which arose from Gestapo-like raids by the West German security services on the offices of *Der Spiegel* magazine over stolen military documents containing sensitive information, the Court was split 4-4 on whether the state actions were invalid. Murphy notes that this case provided “a pair of strong hints that, if squarely presented with a clear clash between dignity and security, the court will not automatically put dignity above survival, but will rationalize that survival is essential to dignity.”⁵⁶⁸

In the post-1949 German constitutional framework, the ‘free democratic basic order’ is decidedly not negotiable. It is what Kommers calls the “architectonic political principle” which informs the Basic Law as a whole; based on the jurisprudence of the *BVerfG*, the preservation of this principle can, crucially, be used to limit all rights, even those cast in absolute terms.⁵⁶⁹ In practice, the principle can be used by the Court to declare as unconstitutional any political parties which might threaten the democratic system.⁵⁷⁰ Since the establishment of the Basic Law the Court has only exercised this power twice, banning two parties in its first decade.⁵⁷¹

Carl Schmitt’s question of who guards the constitution against the enemies of democracy⁵⁷² dominated post-war legal debates,⁵⁷³ and avoiding the pitfalls of the Weimar Republic thus became the *sine qua non* of the 1949 German constitutional project. Possible contenders who could fight the enemies of democracy ranged, notes Müller, from “a strong president (who would have been Schmitt’s own choice), to the state bureaucracy and even the trade unions.”⁵⁷⁴ For Hans Kelsen, Schmitt’s long-time nemesis, the guardian of the constitution had to be a process of constitutional judicial

⁵⁶⁷ *Der Spiegel Case*.

⁵⁶⁸ Murphy, 'An Ordering of Constitutional Values', p. 752.

⁵⁶⁹ Kommers, (1991). p.857.

⁵⁷⁰ Article 21(2).

⁵⁷¹ *Socialist Reich Party Case; Communist Party Case*.

⁵⁷² Carl Schmitt, *Die Hüter der Verfassung*, (Mohr, 1931).

⁵⁷³ Jan-Werner Müller, *Constitutional Patriotism*, (Princeton University Press, 2009), pp. 18-19.

⁵⁷⁴ *Ibid.* p. 19.

review by a dedicated tribunal.⁵⁷⁵ Through its 1958 *Lüth* ruling it was ultimately the *BVerfG* which emerged in this ‘enemy-fighting’ role in which “judicial review of almost any legal and political decision became legitimate.”⁵⁷⁶ In *Lüth*, the Court stated:

The Basic Law is not a value-neutral document. Its section on basic rights establishes an objective order of values, and this order strongly reinforces the effective power of basic rights. This value system, which centres upon the dignity of the human personality developing freely within the social community must be looked upon as a fundamental constitutional decision affecting all spheres of law, both public and private.⁵⁷⁷

Lüth is probably the Court’s most important ever case and effectively “constitutionalised the whole of German law.”⁵⁷⁸ As well as enunciating its objective value order and repeating its ‘image of man’ vision of the relationship between the individual and the community, it declared that the Basic Law applied to private relationships and contracts, and not just public authority as is the case with the U.S. Constitution. Indeed, the doctrine of Third Party Effect followed logically from the Court’s demolition of the border between public and private law, and from its Aristotelian conception of the individual as part of their community.

It was in this newly created court that the ‘leave nothing to chance’ mantra of Karl Löwenstein’s militant democracy⁵⁷⁹ was made real. As Teitel puts it, “a militant constitutional order is vigilant not only to the excesses of state power but also to those of popular sovereignty.”⁵⁸⁰ Its end result, as Kommers notes, is that the unchangeable principle of democracy enshrined in the Basic Law now “finds itself locked in the permanent embrace of mutual tension with constitutionalism.”⁵⁸¹ This represents a move from the value neutral democracy of Weimar to the constitutional democracy of the Federal Republic and its ‘objective order of values’ as promulgated by the justices in Karlsruhe. Such a democracy is, as Müller notes, “expressly not neutral about its own principles and values – and puts in place strong checks on those hostile to its

⁵⁷⁵ Collings, p. xxxv.

⁵⁷⁶ Müller, *Constitutional Patriotism*, p. 19.

⁵⁷⁷ *Lüth Case*.

⁵⁷⁸ Collings, p. 54.

⁵⁷⁹ Karl Loewenstein, ‘Militant Democracy and Fundamental Rights, I’, *American Political Science Review*, 31, (1937); Karl Loewenstein, ‘Militant Democracy and Fundamental Rights, II’, *American Political Science Review*, 31, (1937).

⁵⁸⁰ Ruti G. Teitel, *Transitional Justice*, (Oxford ; New York: Oxford University Press, 2000). p.203.

⁵⁸¹ Kommers, (1991). p.853.

principles.”⁵⁸² The concept of the militant democracy is perhaps best encapsulated in Popper’s observation on the ‘paradox of tolerance’ where “unlimited tolerance must lead to the disappearance of tolerance.”⁵⁸³ Following Saint-Just, the Basic Law’s mantra, particularly at its establishment, could be said to have been ‘no freedom for the enemies of freedom’. Article 18 allows for the “forfeiture” of basic rights for anyone using them “to combat the free democratic basic order”, which the *BVerfG* alone can decide. Even during a state of emergency the Court retains jurisdiction.⁵⁸⁴ “To avoid the possibility of ‘democratic suicide’ the constitution of the Federal Republic included an article, the so-called eternity clause, closing off the possibility of abrogating the fundamental principles underlying a liberal democratic order.”⁵⁸⁵

Of the 18 articles contained in the Basic Rights section of the Basic Law, several are “word for word reproductions of corresponding articles in the Weimar Constitution of 1919”; the difference being that Weimar viewed the norms as being “aspirational” while in the Basic Law, these are “judicially enforceable norms”.⁵⁸⁶ Unlike the Weimar constitution, the Basic Law is supreme over the German parliament and all other organs of the state, and governs the entire German legal order. The rights provisions included in the Basic Law are treated as *judicially enforceable norms* and are declared by Article 1, paragraph 3 “to bind the legislature, the executive and the judiciary as directly applicable law.” Article 20 underpins the supremacy of the Basic Law while also underscoring the difference from the legal positivist focus only on *Gesetz*, stating that: “the legislature shall be bound by the constitutional order, the executive and the judiciary by law (*Gesetz*) and justice (*Recht*). These and other sections of the Basic Law such as the Article 79 eternity clause (*Ewigkeitsklausel*) which forbids amendments to Article 1 or Article 20 creates the idea of the Basic Law being a protective shield for German democracy and German constitutionalism. Indeed such is the shadow that the experience of Weimar and the 1930s continues to cast that the German constitution paradoxically imposes certain constraints on democracy in the interests both of

⁵⁸² Jan-Werner Müller, 'On The Origins of Constitutional Patriotism', *Contemporary Political Theory*, 5, (2006), p. 279.

⁵⁸³ Karl R. Popper, *The Open Society and its Enemies. Vol 1, The Spell of Plato*, (Routledge & K Paul, 1962.

4th (revised) ed., 1962). p. 265.

⁵⁸⁴ Kommers and Miller, p. 52.

⁵⁸⁵ Jan-Werner Müller, *A Dangerous Mind : Carl Schmitt in Post-War European Thought*, (New Haven : Yale University Press, 2003). p. 65.

⁵⁸⁶ Kommers and Miller.p. 44.

constitutionalism and “the free democratic basic order”⁵⁸⁷ which is one of the most oft-repeated and significant phrases in the Basic Law. The paradox inherent in curbing democratic processes to preserve the super principle of the free democratic basic order is a palpable feature of German constitutionalism.

By the early 1980s after three decades of economic growth and with an apparently stable, if sometimes colourless, democracy the people and leaders of the Federal Republic could reasonably point to some success. Yet despite the militant democracy, doubts remained about how resilient a constitutional democracy the Bonn republic had actually become, revealing Böckenförde’s concern again. To some there was a suspicion that the stability of the political system was perhaps no more than a temporal illusion created by the increasing distance from 1945, where economic performance masked political commitment.⁵⁸⁸ If the Federal Republic was only a fair weather democracy, the concern was whether there was “a reliable political culture, a firm value orientation which would safeguard the democratic regime in time of crisis.”⁵⁸⁹

While the fair weather democracy argument may have still been faintly plausible in the 1980s, this point still neglects two important aspects of Germany’s development after 1949. One was the important domestic debate over the *Vergangenheitsbewältigung* and the coming to terms with the so called *NS Zeit* which paralleled the growing sense of affinity between the German people and their Basic Law. However, the implications of the ‘Böckenförde Dilemma’ were that liberal democracies, especially Germany’s, lay perilously exposed without the internal bonding forces of God or country. Even more than today, for the Germany of 1964 country was certainly not an option, leaving only Böckenförde’s emphasis on religion as an acceptable internal source of cohesion. One other important source of cohesion in Germany was law itself. It was the deep cultural respect for Germans in law that predated the FRG which provided the newly established *Bundesverfassungsgericht* with enhanced legitimacy at a time when there was little trust in political institutions. The importance of law to the success of post-war German constitutionalism is addressed in the next section.

⁵⁸⁷ See Articles 10(2), 21 (2), 11(2), 18, 73(1), 87(4), 91(1).

⁵⁸⁸ Rainer M. Lepsius, 'Institutional Structures and Political Culture', in *Party Government and Political Culture in Western Germany*, ed. by Herbert Döring and Gordon R. Smith (London: Palgrave, 1982). p.116.

⁵⁸⁹ Ibid. p.116. See also Dahl, who notes the connection between a well functioning economic order and democracy. See Dahl, *How Democratic is The American Constitution?* See *supra* note 47.

6.7 In Law Germany Trusts

The Basic Law put in place mechanisms to divide and limit political power, and place law at the heart of the constitutional order. Positive law via the application of the German legal code was still relevant, but with the rights articles of the Basic Law and their associated values governing the entire legal order, all aspects of German law have increasingly taken on constitutional significance. Germany's new constitutionalism differed markedly from the Weimar Republic and the previous German constitutions by emphasising, firstly, that "all state authority is derived from the people"⁵⁹⁰ to be exercised through the medium of representative democracy, and secondly, the central importance of *law* in political and economic matters. "The founders of the Federal Republic, successive legislators and, above all, the justices in the Federal Constitutional Court have relied upon the power of legal provisions to ensure the proper functioning of many important elements in the country's political system."⁵⁹¹ To appreciate the special status given to legal mechanisms in binding Germany's post-1949 constitutional system and political system one must recognise the historic affinity for law in Germany.

Politics had been discredited by the Weimar Republic and the Third Reich, and the old German belief that politics was essentially a dirty business and law a clean one reappeared and gained confirmation. [...] The German belief in the purity of law had always differentiated between law in its original and natural state, and that which lawyers and judges make of it. [...] Dirty politics suffered from a deficit of legitimacy, while clean law and its representative, the *Bundesverfassungsgericht*, enjoyed a legitimacy "surplus". These were the conditions that invited and demanded that the *BVerfG* take on an activist role.⁵⁹²

In 1951, when the Court first began to hear cases, it remained to be seen how effective it would be in protecting the new democratic constitutional order, how authoritative would be its rulings, and whether it could instil in the German people a respect for constitutional government which had been discredited, first, by the shortcomings of Weimar, and then by the assault on the constitution by the Nazis. Constitutional courts of the German variety have fared well, writes Somek, "where the people are traditionally respectful towards, and heedful of, authority."⁵⁹³ Of course, it

⁵⁹⁰ (Article 20(2) GG)

⁵⁹¹ Carl-Christoph Schweitzer, *Politics and Government in The Federal Republic of Germany : Basic Documents*, (Leamington Spa: Berg, 1984). p.xvi.

⁵⁹² Schlink. pp.210-211.

⁵⁹³ Somek, p. 96.

was this same excessive respect for authority in Germany that had made things so easy for the Nazis in the first place. While it may be some comfort that it is the benign justices of the *BVerfG* who are in charge constitutionally, Germany would be a weak liberal democracy if its citizens simply respected the authority of judges rather than the substantive values they are enunciating.

Rights, human dignity, and party democracy constitute the centrepiece of constitutionalism in the Basic Law.⁵⁹⁴ Compared to the American Bill of Rights which was only added to the Constitution as an afterthought through the amendment process, the fundamental and unamendable rights provisions of the German Basic Law are at the very start of the constitutional text.⁵⁹⁵ From the outset the framers of the Basic Law recognised that the document had to restore the faith of ordinary Germans in law after the 13 year assault on the *Rechtsstaat* by the National Socialists. Equally important, though, was rooting the new constitutional order in society through an emphasis on *human dignity* and *law*. Stern explains that in the Germany shaped by the Basic Law:

We do not have a government of judges. What has evolved is that which was expressed by the Parliamentary Council (and which could also be said about the Supreme Court of the United States of America):

The foundation of the state is at stake here: Law is either recognized as the basis of human society and enforced with the necessary guarantees for its implementation, or political expediency will rule the day, leading once again to the dangerous fundamentalist dogmas of the past where law is reduced simply to what benefits the people or the government or the state.⁵⁹⁶

As Stern notes, this declaration echoes the choice of words used in the proclamation which the July 20th plotters planned to sign in the event that they had succeeded in killing Hitler:

Our first task is to re-establish the unimpaired majesty of the law.
[...] No human society can exist without law; no one, not even those who fail to honor the law, can do without it.⁵⁹⁷

⁵⁹⁴ Stern, p. 19.

⁵⁹⁵ Articles 1 to 3 of the Basic Law.

⁵⁹⁶ Stern, p. 22. Here Stern cites the words of the Parliamentary Council which drafted the Basic Law in 1948.

⁵⁹⁷ Ibid. p. 33.

This was not mere prose. The continuity between the ideas of some of the plotters and Germany's post-war constitutional order is perhaps best seen in the figure of Fabian von Schlabrendorff, who escaped almost certain execution in February 1945 when a U.S. bomb crashed through the roof of the Nazi People's Court (*Volksgerichtshof*) killing the notorious presiding judge Roland Freisler. In 1967 Von Schlabrendorff became a judge on the *Bundesverfassungsgericht*. The very basis on which the Federal Republic's constitutional court was founded was a repudiation of the Nazi period where positivist law became a means to nefarious ends. It is impossible, as Bruce Ackerman notes, to understand the success of the *BVerfG* without recognizing that "the Basic Law has become, in the society at large, a central symbol of the nation's break with its Nazi past."⁵⁹⁸

To ensure the Court's removal from political pressure the country's founders determined that it should be located in Karlsruhe, far away from the West German institutions of power in Bonn. In the 65 plus year existence of the Federal Republic, the Court's judgements have profoundly influenced German life to such an extent that some speak of the 'Karlsruhe Republic'.⁵⁹⁹ The central role of the *BVerfG* in constitutional interpretation and the respect which is afforded to it in modern Germany have had important consequences, such as in the moulding of the country's political system. In the German context, however, some of these effects which the Court's rulings have had on political and social life go beyond even the generally political nature of constitutional decision-making. They are the result of the specific circumstances of twentieth-century German history and of Germany's political class coming to the conclusion after 1949 that rampant judicial authority pronouncing on political and social questions was a more acceptable alternative than strident political, or people power. As Möllers observes, "since its inception, the *Bundesverfassungsgericht* has been Germany's most popular institution."⁶⁰⁰

For many modern theorists of constitutionalism, the German model of constitutionalism is correct precisely because it is, as Stern notes, a "legal constitution" based on fundamental normative principles and "legitimized by the ultimate source of state power, namely the people."⁶⁰¹ The key role of fundamental rights in post-war

⁵⁹⁸ Ackerman, 'The Rise of World Constitutionalism', p. 778.

⁵⁹⁹ Heinrich Wefing, 'Der Andere Präsident', in *Die Zeit*, (2016).

⁶⁰⁰ See for example Möllers, "We Are (Afraid of) The People': Constituent Power in German Constitutionalism'. p.96.

⁶⁰¹ Stern, p. 19.

German constitutionalism and the far more dominant position of the *BVerfG* within Germany's constitutional system relative to the Supreme Court makes the U.S. centric academic debate over the 'counter-majoritarian difficulty' seem redundant. Given the already mentioned contempt that many Germans have traditionally felt for politics, legitimacy was never seen as originating from democracy. Rather, the greater emphasis on the principle of *Rechtsstaatlichkeit* is usually sufficient to overcome doubts over the democratic character of judicial review.⁶⁰² Donald Kommers writes that Bickel's 'difficulty' is not relevant due to the preciseness with which the powers and role of the Constitutional Court are delineated, and the Court's obligation to decide cases properly before it.⁶⁰³ "The Basic Law itself resolves the difficulty for no reliance on a theory of judicial review is necessary to justify the exercise of judicial power."⁶⁰⁴ Partly this is due to the enhanced legitimacy which comes from the clarity of the Basic Law in establishing the [Constitutional] Court as the "supreme guardian"⁶⁰⁵ of the constitution, as well as the democratic mode⁶⁰⁶ of appointment of the justices. Heun's observation that "self-restraint is considered as self-authorization which is constitutionally prohibited"⁶⁰⁷ illustrates the degree to which the Basic Law determines the powers, limits, and obligations of the Court, making the American political question doctrine, and the countermajoritarian difficulty a moot point in the context of German constitutional jurisprudence. Put simply, the Basic Law does not allow the justices of the *BVerfG* to escape their responsibilities through use of Bickelian 'passive virtues' to avoid making a decision in a case.⁶⁰⁸ Its function is "to resolve even doubtful questions of constitutionality, not to avoid them."⁶⁰⁹ The unambiguous affirmation of judicial authority in the Basic Law is also one reason why neither original intent nor the notion of judicial restraint are salient issues in German constitutional jurisprudence.

⁶⁰² Koopmans, p. 106. See also Möllers, 'We Are (Afraid of) The People': Constituent Power in German Constitutionalism', pp. 95-96. He notes that the constitutional legitimacy of judicial review was never a topic of interest in the academy or for the people.

⁶⁰³ Kommers and Miller, p. 68.

⁶⁰⁴ Kommers, (1991).p.843.

⁶⁰⁵ Ibid. p. 840.

⁶⁰⁶ Justices must be chosen by a two-thirds majority in the *Bundestag* and *Bundesrat*. The *Bundestag* has "delegated the task of selecting its share of the justices to a special Judicial Selection Committee whose 12 members the *Bundestag* in turn elects." Ibid. p. 844. It is, thus, rather more democratic than that of U.S. Supreme Court justices who are nominated by just one person, the president, and confirmed by the Senate.

⁶⁰⁷ Werner Heun, *The Constitution of Germany : A Contextual Analysis*, (Oxford: Hart, 2011), pp. 183-84.

⁶⁰⁸ This logic of the law, constitutional or statutory, giving judges little room for manoeuvre is more understandable in the German civil law system where the judicial role is to faithfully apply the legal code to the circumstances of a case so that the law reveals the answer. Judge David Edward noted in my interview with him how this style of decision-making works in the French civil law system, "It's a kind of Aristotelian syllogism. Applying that law to those facts, and there you have an answer."

⁶⁰⁹ Kommers and Miller, p. 68.

For one thing, the clarity of the Basic Law provides a set of useful principles for separating matters which are properly political in nature, and those (primarily procedural) matters where it would be legitimate for the courts to rule. In the U.S. context this question might form part of what has come to be called – the political question doctrine. The Basic Law is clear on the difference between political and procedural matters. In Article 44(4): “The decisions of committees of inquiry shall not be subject to judicial review. The courts shall be free to evaluate and rule upon the facts that were the subject of the investigation.”⁶¹⁰

While original intent partly took on more significance in the U.S. due to feelings of reverence for the framers, the German need to avoid undue veneration of political figures after 12 years of the *Führerprinzip* perhaps made the *BVerfG* justices seem more acceptable objects of respect. As Collings observes, “West Germans embraced the Court’s immense power at a time when circumstances led them to view constitutional justice as a precondition to democracy rather than a restraint on it.”⁶¹¹

6.8 Conclusion

This chapter has highlighted the inauspicious circumstances for democracy in 1950s Germany when the *BVerfG* began hearing cases. The lingering questions at the time over the willingness of so many Germans to support, actively or passively, the Nazi regime reinforced the need to establish not only a resistant militant democracy but a supportive constitutional culture, which would permit liberal democratic values to take root in Germany.

In creating its so-called ‘Aristotelian polis’, the *BVerfG* was attempting to reinforce the German values of community as a force of cohesion in Böckenfördean terms, but without sacrificing the dignity of the individual in the community. What assisted the Court in being accepted is the immense cultural respect for law in Germany. What was uncertain was how much that respect for law could provide the basis for a democratic culture that respected fundamental rights. Law, as it emerged in the Basic Law was no longer rooted in the legal positivism of the Weimar Republic, but in supra positive principles of justice. The emergence of the Basic Law’s ‘objective value order’ as enunciated by the *BVerfG* built on this conception of justice as it sought to entrench

⁶¹⁰ 'Grundgesetz Für Die Bundesrepublik Deutschland', (Berlin: Deutsche Bundestag, 2014).

⁶¹¹ Collings, p. 305.

the fundamental values of human dignity and the free democratic basic order at the centre of the constitutional order.

The question assessed in the next chapter with reference to the European Parliament (EP) electoral threshold cases is whether the balance the Court has struck between the imperative of the militant democracy and the rights of German citizens is the correct one. At issue is the *BVerfG*'s central role within Germany's political and legal order, its decisions and reasoning in the EP cases, and the comments of its president that the Court is on the side of the people. The question posed is whether the Court's position has become so powerful that it has effectively relegated the *Bundestag* to the position of an *ersatz* legislature, as a former justice put it,⁶¹² while overlooking potential threats to stability that are increasingly hard to miss.

⁶¹² See *infra* note 749.

Chapter 7 - Karlsruhe and The People

Once the majority of voters in democratic elections vote for parties committed to rejecting or attacking the existing constitutional order, a political system no longer stands a chance.⁶¹³ (Ulrich Wenner)

There is hardly an essential process of constitutional life that cannot become embroiled in a proceeding before the Federal Constitutional Court.[...] Thus are the gates thrown open, despite various warnings and terrifying precedents from earlier times, to the double danger of a juridification of politics and a politicisation of justice.⁶¹⁴ (Werner Weber)

⁶¹³ Wenner, p. 40. My translation from: “*Wenn die Mehrheit der Wähler in demokratischen Wahlen Parteien wählt, die die bestehende Verfassungsordnung dezidiert ablehnen oder bekämpfen, hat ein politisches System keine Chance mehr.*”

⁶¹⁴ Werner Weber, *Weimarer Verfassung und Bonner Grundgesetz*, (Karl-Friedrich Fleischer, 1949), p. 25. Cited in Collings, p. xxvii.

Donald Kommers observes that “the law of democracy in Germany represents a vast jurisprudence”.⁶¹⁵ That there even is a ‘law of democracy’ in German constitutional jurisprudence is indicative of a German political system governed much more by law than is the case in the United States. Yet as Germany’s democratic culture has seemingly become more mature the need to maintain all of the different facets of the militant democracy has been questioned. Germany’s new constitutionalism as it emerged in the 1949 Basic Law had two main aims. First, to create a stable and democratic government based on the authority of the people derived from regular representative elections. Second, to protect the rights and dignity of all individuals against both state power and the unconstrained will of the people. The possibility of allowing voters a completely free choice between all political parties—including those which might abolish democracy—was never entertained because the German founders saw that rights and human dignity could only exist if the political order committed to upholding them survived. Or, as Murphy construed the *Der Spiegel* Case decision, “survival is essential to dignity.”⁶¹⁶ However, the drawback was that this militant democracy could not be sustained, as Böckenförde identified, without the sacrifice of part of the liberal state’s liberalness.⁶¹⁷

This chapter broadly considers the relationship between German democracy and the German people as mediated by the *Bundesverfassungsgericht*. As noted in the previous chapter, it was at least in part the immense respect for law in German society and culture which bought the Federal Republic some breathing space with the German people in its early years. Also needed, though, was the creation of a supportive democratic culture. The roots of representative democracy in Germany could be traced back over a century to the revolution of 1848 and the short-lived constitution of 1849, but they were not deeply planted. Justin Collings observes that

The principles of *Demokratie* and *Rechtsstaat*—of democracy and the rule of law—had parted paths after the failed revolution of 1848. More recently, the Nazis had obliterated both principles. The

⁶¹⁵ Donald P Kommers, ‘The Federal Constitutional Court: Guardian of German Democracy’, *The ANNALS of the American Academy of Political and Social Science*, 603, (2006), 116.

⁶¹⁶ See *supra* note 568.

⁶¹⁷ Böckenförde, p. 45.

Court's commission was to restore them; its supreme achievement was to reunite them. But the rule of law came first.⁶¹⁸

What was necessary, then, at least initially, was for Germany's nascent democratic institutions to be reinforced through the already deep respect for law in the country. As will be shown, this has been partly achieved through the role of the constitutional complaint mechanism which has made Germans more acutely aware of their democratic and individual rights.⁶¹⁹ The rest of this chapter considers the role of the *BVerfG* in the restoration of democracy within the German constitutional order through reference to the constitutional complaint mechanism, the Court's support for German political parties, and the importance of law.

This chapter will address this broad question with reference to how the *BVerfG* has balanced threats to stability within the German political system and the importance it attached to the principles of electoral equality and equal opportunity among political parties. It will do this by examining one important strand of the concept of militant democracy: the constitutionality of statutory barring clauses ("*Sperrklauseln*") with respect to German political parties participating in elections within Germany and for the European Parliament.

I will firstly examine the constitutional role of the Court in dealing with political parties in the German system, particularly through its historical role in managing the integration of new political parties, like the Greens, into the system. I will then assess the historical background regarding the necessity of having barring clauses (*Sperrklauseln*) in the context of the failure of the Weimar constitution and the establishment of the Basic Law, before examining the European Parliament cases. In the final section, I will examine the changing relationship of the Court with the German people before questioning whether its central role in the country's constitutional order represents a risk to German democracy, or its strongest foundation.

7.1 Overview

The Basic Law does not explicitly define the term 'democracy'; instead, the *BVerfG* has generally defined German democracy in the context of the related institutions and principles in the Basic Law.⁶²⁰ In Germany, the sovereign authority of the people is represented through the lower house of the German parliament, the *Bundestag*. As the

⁶¹⁸ Collings, p. 1.

⁶¹⁹ See *supra* note 218.

⁶²⁰ Kommers and Miller, p. 216.

central and “the only directly democratically legitimated representative body” in the German system, the *Bundestag* has a special role in ensuring that “state power is actually based on the people’s recognition and approval.”⁶²¹ One of the main puzzles in the relationship between the *BVerfG* and German democracy is that while its decisions in the European Parliament (EP) electoral threshold cases⁶²² highlighted the importance of electoral equality, popular sovereignty and democracy, each of these opinions was also highly assertive of the Court’s power vis-à-vis the German Parliament and federal government. The Court’s decisions striking down the 5 percent and, then, 3 percent thresholds for EP elections in 2011 and 2014, respectively, scaled back aspects of the militant democracy, and restored the voting rights of those voting for smaller parties, even while overruling the elected representatives of the German people in the *Bundestag*. Given both the crucial role of parties in the German political system as organs of state “in the formation of the political will of the people”⁶²³ and the enduring memory of the fate of the Weimar Republic, any change to these thresholds, even at the EU Parliament level, remains contentious. As much as these decisions were criticised by politicians in Berlin, the larger complaint about the Court from constitutional scholars and even some of its former justices is the increasingly inconsistent reasoning by which it has reached some of its decisions.

The *European Parliament* electoral threshold cases that have reached the Court highlight a number of specific problems related to these cases and broader problems with the Court’s methodology over several decades. Firstly, the extent to which the Court’s emphasis on material conditions at the time “*Verhältnisse*” may have made it overly responsive to a changing context and the forces of renewal, and insufficiently attentive to the Basic Law, its past case law, and its own reasoning in that case law. Secondly, the cases illustrate a development in the Court’s jurisprudence from the early days of the Federal Republic from an emphasis on stability to almost a reverence for renewal. In other words, the Court has become too ‘renewal’ focused and not placed enough emphasis on stability, both of the political system, and its own consistency. Third, that this emphasis on the changing context has made the Court too reliant on a living instrument means of interpretation that many judges in the ordinary German courts find troubling. Fourth, that the cases illustrate a broader tendency of the justices

⁶²¹ Brenner, p. 135. Cited in Kommers and Miller, p. 217.

⁶²² *European Parliament II Case* p. 263; *European Parliament III Case*

⁶²³ Article 21(1). Grundgesetz Für Die Bundesrepublik Deutschland, (2014).

on the court over decades, who have, notes Collings, “seemed to do more as the country has needed them less”⁶²⁴. While the *BVerfG* has been, and remains, an impressive and essential institution at the heart of Germany’s constitutional order, one question is whether the increasingly tenuous relationship between its decisions and the Basic Law poses risks to the Court’s position and standing with German citizens?

Some comparison with the jurisprudence of the Supreme Court is also worthy of note. In rejecting any claim to a timeless validity in constitutional meaning with respect to the fundamental value of human dignity, the *BVerfG* has more clearly adopted a living constitution approach to constitutional interpretation. This approach, as will be shown, is quite common to modern constitutional courts.⁶²⁵ The criticism, however, of the *BVerfG* from a number of German constitutional scholars, some of its former justices, and a former judge of the European Court of Justice, is that the living instrument approach has been taken to such extremes by the Court that it is often difficult to make sense of its reasoning.

As with the decision-making of the Supreme Court seen in the U.S. reapportionment cases which recognised the evolving conception of equality in society and American history, so the *BVerfG*’s decision to strike down the 5 percent, then 3 percent, *Sperrklauseln* for European Parliament elections evidences a shifting balance away from the militant democracy and managing threats to stability, and towards a greater realisation of the value of equality and human dignity in the Basic Law’s fundamental rights section. One interpretation could be that the *BVerfG* is edging towards, at least at the EP level, a normalisation of German identity, meaning that German citizens voting for fringe parties no longer have to be disenfranchised to protect the political system.

Are these developments the result of a change in the threats that the Court perceives to the free democratic basic order—that is to say a change in actual “conditions” [*Verhältnisse*] as it put it in the *European Parliament II Case*⁶²⁶—, are they merely the result of the Court re-formulating its decision according to a changing conception of equality, or does the Court’s willingness to reimagine constitutional principles suggest it is also reimagining its own constitutional and political role?

⁶²⁴ Collings, p. 302.

⁶²⁵ See *infra* note 733.

⁶²⁶ *European Parliament II Case*

The shift towards constitutional case law in Germany and away from legal positivism is indicative of the effect that the *BVerfG* has wrought on the country's legal order since it began hearing cases in 1951. That effect reflects a shift within from the traditional German legal concept of *Begriffsjurisprudenz* reflecting the scientific, systematic analysis of law associated with legal positivism, to a less methodologically consistent and more politically aware style of decision-making by the *BVerfG*.⁶²⁷ The important place given to law and the Karlsruhe justices in determining whether statutes, the actions of the state, and the judicial decisions of the ordinary courts conform with the Basic Law has led the *BVerfG* inexorably into areas of political and social policy. One of the reasons for this, which will be examined in Section 7.7, is that some of the Court's most contentious decisions do not actually settle an issue in a way that decisions of the U.S. Supreme Court are accepted as settled even when people disagree over them. As will also be shown, though, this indeterminacy also allows for the possibility of the Court changing course.

Bernhard Schlink's criticism of the Court as a respected German legal scholar, and constitutional court judge of the federal state of *Nord-Rhein Westfalen* was significant.⁶²⁸ However, it is also important to state that his critique came during the most difficult period in the Court's history. After a series of high profile and controversial cases dealing with free speech and freedom of religion, the *BVerfG*'s normally high favourability ratings sank dramatically with the German public. Writing in 1994, Schlink argues that the Court's jurisprudence has simply allowed the losers in the legislative sphere to get their policies enacted by submitting to the rule of Karlsruhe.⁶²⁹ One aspect of this is the abstract review process where recognised organs of state, including parliamentary groups of sufficient size, can challenge political decisions that go against them by appealing to the justices in Karlsruhe. In this way, the parliamentary opposition defeated in the *Bundestag*, or the state (*Land*) that sees a decision go against it in the Federal Council (*Bundesrat*) is "given a new chance to challenge the winning majority and to continue to debate their differences of opinion."⁶³⁰

⁶²⁷ See Schlink, p. 198. Schlink writes that "constitutional judicial decision-making is understood and presented more or less politically."

⁶²⁸ Schlink is also a best-selling author, most notably, *The Reader*, which became an Oscar winning film starring Kate Winslet.

⁶²⁹ Schlink, p. 215.

⁶³⁰ Alfred Rincken, 'The Federal Constitutional Court and the German Political System', in *Constitutional*

Schlink has suggested, the methodological consistency of the rulings of the *BVerfG* has been found wanting as it increasingly intervenes judicially in areas of social and political life based on its feel for what decision might best fit the rubric of society. There are risks here if the Court is calibrating the correctness of its decisions less against the fundamental precepts of the Basic Law and more against what Schlink calls its “feel for what is indicated by social and political life—for what is accepted and ‘fits’ into the social and political landscape.”⁶³¹ If the Court has simply become another actor in Germany’s political firmament the concern would be that it is endangering not only its position as one of the country’s most respected institutions, but the respect Germans have for law itself.

Moreover, as Collings notes, the Court “cites itself far more often than it cites the constitution”⁶³² which raises concerns about whether German constitutionalism is metamorphosing as a result of developing understandings of the Basic Law or the Court’s own enormous case law. The threshold between where constitutional understandings end and the *BVerfG*’s repetition of its own case law begins is increasingly hard to define. One example is the rule of optimization for basic rights, which when subjected to the Court’s balancing exercise makes basic rights more of a lottery than a constitutional guarantee.

The ‘rule of optimization’—as much individual freedom as can be realised in accordance with what is legally and actually possible—is such an open-ended concept that it can justify any state intrusions upon freedoms. Although the *BVerfG* does not actually permit every state intrusion, its decision to confirm or reject a particular intrusion may often come as a surprise, pleasant or unpleasant, depending upon one’s point of view.⁶³³

Thus, even under the tightly defined structures of the Basic Law, the interpretive methodology of the *BVerfG* is something of a moving target. The perception that judicial decisions are being made in an arbitrary and unpredictable manner is a particular damaging one for the credibility of any court.⁶³⁴ Decision-making which

Courts in Comparison: The US Supreme Court and The German Federal Constitutional Court, ed. by Ralf Rogowski and Thomas Gawron (New York: Berghahn Books, 2002), p. 65.

⁶³¹ Schlink, p. 215.

⁶³² Collings, p. 302.

⁶³³ Schlink, p.213

⁶³⁴ For example, a former lord justice of the Court of Appeal, Stephen Sedley, argues that “many judges believe, not without reason that certainty is the law’s greatest virtue.” Stephen Sedley, *Ashes and Sparks : Essays on Law and Justice*, (Cambridge: Cambridge University Press, 2011), p. 205.

jettisons the Court's own long-standing case law and actual circumstances in favour of a "feel"⁶³⁵ for preferred or popular outcomes risks undermining the stability which has underpinned the success of post-war German constitutionalism.

7.2 Electoral Thresholds: The Lessons of Weimar

Although the *Bundesverfassungsgericht's* power to ban political parties that threaten the free democratic basic order is its most high profile weapon, it is the statutory 5 percent threshold for electoral success (or *Sperrklausel*)⁶³⁶ which is the most counter-majoritarian element of Germany's democracy. Only political parties that gain 5 percent of the national vote or more will get seats in the *Bundestag*, while those voting for parties that fail to reach the 5 percent threshold see their vote wasted. Since the founding of the Federal Republic, the high democratic cost of the *Sperrklausel* has been seen in the FRG as a price worth paying to avoid the fate of the Weimar Republic.

It is reasonable, of course, to compare the effective nullification of the votes of German citizens who choose parties garnering less than 5 percent of the vote with the devaluation of the votes of urban residents in the U.S. due to malapportionment. Both involve the disenfranchisement of certain citizens, but while the devaluation of the votes of urban residents happened for arbitrary reasons to maintain the unconstitutional hold on power of rural representatives, the effective nullification of the votes of German citizens who vote for certain parties is justified, according to the *BVerfG* and statutes, in order to preserve the legislature's ability to function.⁶³⁷

The Court's decisions need to be seen against the backdrop of the stability versus renewal paradigm seen in earlier chapters, where the Court has often tried to balance the need of a German parliament capable of functioning against the oligarchical inclinations among established parties to prevent new entrants into the process. Although a statutory rather than constitutional provision, electoral thresholds (*Sperrklauseln*) have often been seen by the Court as necessary to prevent the type of fragmentation that proved so damaging during Weimar. The Court's decisions to strike down these *Sperrklauseln* at the EP level were highly contentious since they did away with an important statutory power of the *Bundestag* to control the effectiveness of the European Parliament. While the 5 percent threshold remains in place for *Bundestag*

⁶³⁵ Schlink, p. 215.

⁶³⁶ *Sperrklauseln* is the generic term for the electoral thresholds (or barring clauses). The specific term for the 5 percent hurdle is the '*fünf prozent Hürde*'.

⁶³⁷ *National Unity Election Case*, 82 BVerfGE 322 (1990). See Kommers and Miller.

elections, some question whether the EP decisions may signal a reappraisal of even this semi-sacred barring clause which has been in existence since the foundation of the FRG.

Minimum thresholds for electoral success (*Sperrklauseln*) have been part of the architecture of the German constitutionalism since the Basic Law was established. The introduction of electoral thresholds in electoral laws in the 1950s can only be understood against the background of the development and ultimate collapse of the Weimar Republic.⁶³⁸ Wenner notes that the fact that “the collapse of the Weimar Republic was also due to the fragmentation of the party system [...] is often seen as confirmation of the ‘Weimar experience’ and an argument—also accepted by the *BVerfG*—for the necessity of a restriction on electoral equality.”⁶³⁹

The inability of the Weimar parliament to function due to the fragmentation effect of smaller parties resulted in government’s increasing reliance on executive institutions and channels, which were often supplemented by unofficial networks parallel to the state apparatus. It was into these well-oiled executive mechanisms that Hitler gratefully stepped in 1933. Thus, Germany’s founders in 1949 well understood from Weimar how dangerous power vacuums could be and as a consequence the constructive vote of no confidence was enshrined in the Basic Law to ensure that no federal chancellor could be removed without the election of a replacement. During Weimar, the Parliament’s inability to agree on replacement chancellors was made more acute by the plethora of small parties which prevented an agreement among more moderate parties taking shape. The lesson that democracy needed to be credible even at the risk of sacrificing a little democracy to the demands of a stable process was one the German founders took to heart.

The experience of Weimar and the 1930s demonstrated that aspirational rights provisions were meaningless if the constitutional order which guaranteed them was overthrown through democratic mechanisms. This was the paradox of the constituent moment which created the Basic Law where preserving democracy meant limiting democracy, and preserving the individual rights of the people meant limiting the power of the people. Since political disunity was seen as one of the major flaws that crippled the Weimar Republic, the question for the German framers became how to ensure an electoral system that would be both representative and promote political unity. The rule

⁶³⁸ Wenner, p. 5.

⁶³⁹ Ibid. p. 38.

that parties should achieve a minimum threshold of electoral success in order to enter the *Bundestag* has been a feature of the German electoral system since 1949 and by 1952 a 5 percent rule had been adopted at almost every level of the federal government.⁶⁴⁰ Many of the parliaments of the German states also prescribed electoral hurdles, so the principle of electing a parliament capable of functioning preceded the Basic Law.⁶⁴¹

Nevertheless, at the Parliamentary Council which drafted the Basic Law, there was disagreement over the part played by smaller parties in the demise of Weimar. Some representatives of smaller parties were strongly against the proposal for a 5 percent electoral hurdle which they saw as an effort to permanently stabilise the position of the larger parties.⁶⁴² Some representatives “clearly saw the danger that the dynamism of political life could be considerably restricted” by an electoral hurdle and that “a young, powerful movement that bursts forth among the people and tries to rectify the misgovernment of larger parties” would be brought to a halt by the constitution.⁶⁴³ Of course, the smaller parties had a point, which is why the debate over electoral hurdles has never gone away. However, in 1948 when this debate was taking place, the majority of delegates had seen quite enough of young powerful movements that burst forth from the people.

When judging the constitutionality of barring clauses—which “justify distinctions between votes”—the legislature’s ability to function stands out as a fundamental criterion in the context of the history of the Basic Law and the *BVerfG*’s jurisprudence.⁶⁴⁴ In Weimar, as stated, the fragmentation of the *Reichstag* due to the plethora of smaller parties brought the legislature to a standstill and democracy into disrepute, with inevitable and terrible consequences. The rise of right-wing populist politicians in liberal democracies who have capitalised on both political dysfunction and liberal values underline the importance of constitutionalism in striking a balance between preserving the viability and functionality of legislatures on the one hand and upholding the importance of principles of equal suffrage on the other.

⁶⁴⁰ Kommers and Miller, p. 254.

⁶⁴¹ Wenner, pp. 90-91.

⁶⁴² Ibid. p. 91.

⁶⁴³ Ibid. My translation from: “Deutlich wurde bereits damals die Gefahr gesehen, dass mit Hilfe einer Sperrklausel die Dynamik des politischen Lebens erheblich eingeschränkt werden könnte, und einer ‘jungen kräftigen Bewegung, die unten im Volk aufbricht und sich bemüht, die Mißwirtschaft großer Parteien zu beseitigen’, von der Verfassung her ein Riegel vorgeschoben werden könne.”

⁶⁴⁴ See *National Unity Election Case*. Cited in Kommers and Miller, p. 256.

While members of the Court and German public figures have perhaps rightly chastised the established political parties for creating a sense of ossification within the system, the maintenance of the 5 percent threshold at the EU level does not seem to fit into this category. Rather it seems a reasonable measure to ensure that the only institution to be democratically elected by all EU citizens is able to function. 14 EU states currently have electoral thresholds for EP elections. The argument is sometimes made by those opposing the hurdle that many far right parties such as the Front National in France clear the threshold easily and so it chiefly serves to exclude smaller, esoteric and generally non extremist parties such as (in Germany) the Animal Protection Party (*Tierschutzpartei*) and the Pirate Party (*Piraten*), to name just a couple. The risk, however, is that too many such small parties can prevent the mainstream parties from forming a governing coalition and it is the extremist parties that capitalise on that situation.

Decisions which seek to strike the right balance between the requirements of the militant democracy and ensuring the election of a parliament which reflects the party choices made by the electorate are always likely to attract criticism from some quarter, particularly from supporters of parties losing out. The main route for political parties and citizens challenging rules such as the 5 percent threshold is the constitutional complaint mechanism, allowing them to file a petition with the *BVerfG* when they consider one of their constitutional rights has been interfered with. Apart from providing the means by which the electoral threshold for EP elections was ruled unconstitutional, the mechanism for constitutional complaints (or *Verfassungsbeschwerden*) has played a hugely important role in establishing a democratic constitutional culture in Germany. It will now be considered.

7.3 Constitutional Complaints

The creation of a reliable constitutional culture in Germany has been seen as an important adjunct to the structural safeguards in the Basic Law. It might also be the case, however, that elements of the structure of the constitution have contributed to the forging of a constitutional culture. The ability of German citizens, and political and state actors to file constitutional complaints with the *BVerfG* represents an interesting German variation on separation of powers principles. Within Germany's constitutional system, the Basic Law confers independent rights on five institutions: the federal government (chancellor and cabinet), president, *Bundestag* (lower house of parliament),

Bundesrat (upper house of parliament), and *Bundesverfassungsgericht* (Federal Constitutional Court), and are the Federal Republic's highest constitutional organs.⁶⁴⁵ The Constitutional Court is *primus inter pares* among these organs, writes Kommers, because "it has the authority to define the others' institutional rights and duties when resolving conflicts between them."⁶⁴⁶ Where conflicts do occur, such as between individual political parties, or between political parties and the *Bundestag*, they can become the subject of *Organstreit* proceedings before the *BVerfG*. Constitutional scholars tend to see separation of powers in terms of a "creative tension" between the Parliament and federal government, a view, says Kommers, that is anchored in the Basic Law itself.⁶⁴⁷

Verfassungsbeschwerden (Constitutional Complaints)

The Basic Law allows "any person alleging that one of his basic rights [...] has been infringed by public authority"⁶⁴⁸ to file a complaint directly with the Court. Although originally existing only as a statutory privilege to petition the Court, the popularity of this direct route to the Court led the German parliament to amend the Basic Law making the right of petition a constitutional and not just statutory right. By 1970 the Court had received over 21,000 constitutional complaints, representing 96 percent of its caseload.⁶⁴⁹ In 2015, the *BVerfG* received 5,739 constitutional complaints, representing 97 percent of its caseload.⁶⁵⁰ Between 1951, when it began hearing cases, and 2001 the Court heard 135,000 constitutional complaints, 96 percent of which came from private citizens.⁶⁵¹ The right to petition the Court which is now a constitutional right is significant in two ways. Firstly, the popularity of this complaints procedure among ordinary Germans seems indicative of a German public which, to paraphrase Ronald Dworkin, take their rights seriously, seeing in the *BVerfG* a body which is worthy of respect. As Rinken notes, "by protecting his/her basic rights and enforcing his/her interests, the citizen is also fighting for the realisation of the fundamental principles of the constitution."⁶⁵² Perhaps just as significant is that in the the post-1949 period the right to petition was viewed by the Court "as an important means of

⁶⁴⁵ Kommers and Miller, p. 152.

⁶⁴⁶ Ibid.

⁶⁴⁷ Ibid.

⁶⁴⁸ Grundgesetz Für Die Bundesrepublik Deutschland, (2014). Article

⁶⁴⁹ Kommers, (1991). p.841

⁶⁵⁰ Bundesverfassungsgericht, 'Jahresstatistik 2015', (Karlsruhe, 2015).

⁶⁵¹ Collings, p. 287.

⁶⁵² Rinken, p. 67.

instructing Germans in the ways of the Constitution and alerting them to their constitutional rights and responsibilities.”⁶⁵³ Nonetheless, the chances of a constitutional complaint succeeding in Karlsruhe are quite remote. Of the 117,528 complaints submitted between 1951 and 1998, only 3000 were upheld (2.62 percent).⁶⁵⁴ Insofar as German citizens have embraced the notion of constitutional petition to the *BVerfG* and view the Karlsruhe court in positive terms it might be suggested that a constitutional culture of sorts has taken hold in Germany.

Organstreitverfahren (Organ of State Law Suits)

The jurisprudence of the Basic Law rests principally on the theory that separation of powers in modern parliamentary democracies “manifests itself most effectively not in the checks and balances among branches of government but in the duty of opposition parties to confront and publicize the misdeeds of the ruling majority.”⁶⁵⁵ The Christian Democrats (CDU), which led German governments until the late 1960s had hoped that there would be strong ties between the federal government and the *BVerfG*; the Social Democrats (SPD) hoped the Court would serve as an instrument of opposition.⁶⁵⁶ Ultimately it was the SPD hope that was realised. The Court’s repeated affirmation of the “constitutional legitimacy and democratic necessity of parliamentary opposition” has, Collings observes, proved to be “one of the early Court’s greatest contributions to the democratisation of West German politics.”⁶⁵⁷ The *Weltanschauung* of the Basic Law, as enunciated by Karlsruhe, is that opposition forces need the support of law in order to subject state authority to proper scrutiny, and rests on the assumption that without the enforcement of institutional rules, mechanisms and hurdles, there would be no impediments to the abuse of power. Where such rules and safeguards are solely enforced and applied by the political branches—as seen with the U.S. malapportionment issue—political parties and disenfranchised or disempowered groups are left with few, if any, remedies available to them within the parameters of the political system itself. Taking the fight against malapportionment into the federal court system was seen (at the time) as an extraordinary step, whereas under the Basic Law,

⁶⁵³ Kommers, (1991). p.841

⁶⁵⁴ Rinken, p. 68.

⁶⁵⁵ Kommers, 'The Federal Constitutional Court: Guardian of German Democracy', p. 116. One twist on Kommers’ point here is that in *Baker v Carr* it was the ruling minority that had to be confronted.

⁶⁵⁶ Collings, p. 9.

⁶⁵⁷ Ibid.

political actors or individuals going to Karlsruhe to get redress when rules have been broken or rights violated is seen as axiomatic.

One condition for realising the values of the *Verfassungsstaat* is that there is a vibrant system of political opposition, which the Court has enunciated in a number of *Organstreit* proceedings, which are cases involving disputes between different organs of the state. Political parties are also recognised as organs of state in the Basic Law, as they are seen as crucial in the “formation of the political will of the people”⁶⁵⁸. Roman Herzog, the former *BVerfG* president (and president of Germany), credits the party system for its stabilising effect on the state created by the Basic Law, at least over the first forty years of the Federal Republic.⁶⁵⁹ Yet as we will see in Section 7.5, through its decisions regarding the 5 percent electoral threshold (*Sperrklausel*) at the EU and domestic level—which arose out of constitutional complaints filed by German citizens and German political parties—the Court has been controversially prepared to inject new life into the party system where it perceives no threats to stability.

Political organs of the state (including parties) will file *Organstreit* complaints with the *Bundesverfassungsgericht* when, for example, they feel that the majority parties have attempted to deny them reasonable representation in parliamentary committees, or have otherwise sought to use their majority position to subvert principles found in the Basic Law. This interesting utilisation of the Court as an ally by German political parties illustrates how Germany evinces a more nuanced picture of constitutionalism than a simple conflict between judicial and political channels.⁶⁶⁰

German political parties are only too eager to file an *Organstreit* complaint with the *BVerfG*, such as the Green Party did in the 1980s when it was excluded on national security grounds from the committee that controlled the German secret service.⁶⁶¹ From the rough and tumble perspective of politics in the U.K. or the U.S., it may seem strange and even problematic for the health of political debate when politicians run to Karlsruhe every time a political decision goes against them. However, according to the Basic Law, members of the *Bundestag* are “representatives of the whole people, not bound by

⁶⁵⁸ Article 21(1) - Grundgesetz Für Die Bundesrepublik Deutschland, (2014).

⁶⁵⁹ Roman Herzog, 'The Separation and Concentration of Power in The Basic Law', in *Germany and its Basic Law: Past, Present, and Future: a German-American Symposium*, ed. by Paul Kirchhof and Donald P Kommers (Nomos, 1993), p. 399.

⁶⁶⁰ In 2015 the court dealt with 7 *Organstreit* cases. Bundesverfassungsgericht, (2015).

⁶⁶¹ *Green Exclusion*.

orders or instructions, and responsible only to their conscience.”⁶⁶² Thus, if the rights of parties in the *Bundestag* are not respected, then the implications are that the people’s rights are not being respected either. Through its interactions with other organs of state in order to resolve tensions and questions of constitutional interpretation the *Bundesverfassungsgericht* is actively involved in preserving the representative character of German democracy, while also seeking to ensure that minority and opposition parties in the *Bundestag* are afforded their parliamentary rights.

Compared with the appellate jurisdiction of the U.S. Supreme Court which restricts the way that cases can come before it, there are far more avenues by which cases and questions can come before the *Bundesverfassungsgericht*. *Organstreit* proceedings are a form of abstract judicial review, and can originate from the government, from members of the German parliament (the *Bundestag*), or from political parties, which are specially recognised in the Basic Law as the vehicles by which the popular sovereignty of the people is manifested. Since *Organstreit* proceedings can be initiated at the request of political parties or other parts of the government this means there are also more avenues for the *Bundesverfassungsgericht* to intervene in the political process. Nowhere has this been more apparent than the Court’s involvement in shaking up the Germany party system.

7.4 Shaking up the Party System

Existing in a strange tension within the value system of the Basic Law is, on the one hand, the ‘*über-Prinzip*’ of the free democratic basic order and, on the other, the principle of representative government. The latter is intended to dilute and limit the vagaries and extremities of popular will, firstly, through a system of proportional representation and, secondly, through the exclusion from the German parliament of parties that fail to break through the 5 percent threshold. For decades, this adherence to the militant democracy and the inability of any smaller parties to jump over the hurdle meant that party politics in West Germany was limited to a duopoly: the Social Democrats and Christian Democrats.⁶⁶³

As discussed briefly in the previous section, the role of political parties is prescribed in the Basic Law, making them organs of state responsible for the “formation of the political will of the people”. During the 67 years of the Basic Law’s existence, the

⁶⁶² Article 38 (1) Grundgesetz Für Die Bundesrepublik Deutschland, (2014).

⁶⁶³ There were, in fact, three parties: The Christian Democrats (CDU), the Social Democrats (SPD) and the Liberals (FDP), but the Liberals were only ever minor coalition partners of the CDU or SPD.

BVerfG has played an important role in safeguarding the stability of the party system and slowly integrating newer parties into the constitutional order. With its decisions in the European Parliament electoral threshold cases, however, the Court has demonstrated a distinct preference for renewal over stability.

The de facto two-party system created by the Basic Law remained in place until the emergence of the Green Party in the 1980s. There were, of course, good historical reasons for wanting to keep the German people's wishes more tightly circumscribed,⁶⁶⁴ but as German politics and society stabilized into predictability, so came the risk of political and societal ossification. While the rights that strengthened the free democratic basic order and free speech were prioritised,⁶⁶⁵ the militant democracy principle tended to be resistant to new political forces and parties. As one of the most prominent justices in the Court's history, Ernst-Wolfgang Böckenförde, complained about the oligarchical tendency in Germany's established parties⁶⁶⁶, even as federal president Richard von Weizsäcker criticised them for their ossification and lack of creativity.⁶⁶⁷ The Court is itself, however, a product of Germany's party system, given that half of its justices are appointed by the lower house of the German parliament (the *Bundestag*) and half by the upper house representing the German states (the *Bundesrat*). However, the Green Party finally managed to break through the 5 percent threshold in 1983 and, following reunification, the East German left party managed to do the same in 1998.⁶⁶⁸ Over decades the Court handed down an unambiguous line of jurisprudence that the 5 percent hurdle promoted political unity⁶⁶⁹, one of the chief goals of the stability minded German framers following the demise of Weimar. Although the rise of the Green Party changed the configurational complexity of German party politics, it did not affect the overall pre-eminence of the SPD and CDU in coalition building.

The Court's role in breathing new life into Germany's rather grey democracy can be seen in the example of the Green Party who went from pariahs in the 1970s—when they were seen as a threat to stability due to the presence of communists in their ranks—to becoming part of Gerhard Schroeder's government in 1998 with its

⁶⁶⁴ See *supra* note 506.

⁶⁶⁵ See *Elfes* and *Lüth Case*.

⁶⁶⁶ *Green Exclusion*.

⁶⁶⁷ Kommers and Miller, p. 237.

⁶⁶⁸ Kay Alexander Scholz, 'It's Tough Out There for Small Parties', in *Deutsche Welle*, (Bonn, 2013).

⁶⁶⁹ Kommers and Miller, p. 263.

former leader Joscha Fischer becoming foreign minister and vice-chancellor.⁶⁷⁰ During the 1980s the Greens were excluded from a parliamentary committee handling the German Secret Service on security grounds.⁶⁷¹ However, their journey from pariahs to the establishment was completed in January 2001 when Brun-Otto Bryde became the first justice appointed to the *BVerfG* on the Greens' recommendation.⁶⁷² Collings notes that the Greens' "engagement and occasional victories in Karlsruhe played an important role in the party's trajectory towards the constitutional and political mainstream."⁶⁷³ It is therefore, "a telling example both of the Court's role in integrating the country's political forces and of its related effect of taming the country's political process."⁶⁷⁴

Overall, the Court's involvement in the integration of the Greens into the political system has illustrated that it has often had a better awareness of the changing social context than the political branches or established parties. This awareness has not always come swiftly, as decisions that went against the Greens indicated. However, even then, the powerful dissent of Justice Böckenförde⁶⁷⁵ seemingly laid the conditions for future victories for the Greens in Karlsruhe. In his dissent against the Greens' exclusion from the *Bundestag's* Secret Service committee on arbitrary grounds, Böckenförde argued that it is the

general participation in the formation of the political will of Parliament—a process emanating from general intellectual and political discussion and argumentation—that legitimates the inherent right of a parliamentary majority to decide issues of public policy. One process cannot be separated from the other.[...] The principle of complete participation of all—including individuals and parliamentary parties—is not merely an axiom but is also an inalienable principle of a representative parliamentary democracy.⁶⁷⁶

Böckenförde's dissent in the Green Party Exclusion case (above) helps explain, I think, why Geck saw the Court as being so instrumental to the development of democratic understanding in post-war Germany.⁶⁷⁷ Six months after the Greens lost in the *Exclusion Case*, they won a victory in Karlsruhe when the Court struck down a

⁶⁷⁰ See Herzog, p. 399.

⁶⁷¹ *Green Exclusion*.

⁶⁷² Collings, p. 286.

⁶⁷³ *Ibid.*

⁶⁷⁴ *Ibid.*

⁶⁷⁵ *Green Exclusion*.

⁶⁷⁶ *Ibid.* Cited in Kommers and Miller, p. 225.

⁶⁷⁷ Cited in Collings, p. xxxvi. See *supra* note 218.

provision in a tax statute affecting political parties. Böckenförde wrote a separate opinion noting that he would have gone further to protect small parties like the Greens, writing that legislation that bolsters the “oligarchical” and “careerist” elements of the established parties erodes Parliament’s representative character.⁶⁷⁸ The Court sees its role in helping the political opposition in the *Bundestag* as an important one, both to ensure that state power is held to account and thus to ensure the representative rights of all German citizens are fulfilled by ensuring that the parliamentary majority meets its obligations.

The Court may well have seen the European Parliament Cases in the same context as those from the 1980s onwards in which it supported the Greens in their battles with the established parties. In other words, the EP cases of 2011 and 2014, like the Greens’ struggles, were also constitutional battles by smaller parties against the established ones. However, Germany’s political position has changed in Europe since the 1980s and there are more significant threats to stability than those in 1979 when the Court last addressed the question of the electoral threshold at the EP level. The European Parliament of 1979 was a much weaker institution than in 2016, yet the Court upheld the 5 percent threshold despite it mattering far less than today whether the Parliament could function or not. Today, Germany is pivotal to the success of European integration and the EU, yet for all the Court’s references in EPII Case and EPIII Case to the importance of changing its reasoning if the context changes, their decisions to strike down the electoral thresholds seemed to ignore the much greater threats to stability which have existed in recent years.

Things began to change ahead of the 2005 German federal election when the Democratic Socialist Party (PDS), the post-reunification successor to the (ruling) East German Socialist Unity Party, formed an alliance with disaffected elements of Schroeder’s SPD. The new *Linke Partei* (Left Party) represented a significant new political force, polling more than the Greens in the 2005 election. The sudden presence of new parties on the political scene was a challenge to the established dominance of the CDU and the SPD, but it also posed challenges to the Constitutional Court. The Left Party was already comfortably above the 5 percent threshold after 2005, but the new party political landscape appears to have induced the *BVerfG* to reconsider long

⁶⁷⁸ *Party Finance V Case*. Cited in Kommers and Miller, p. 226.

established justifications for keeping the rule in place at the European Parliament level. It is to this question that we now turn.

7.5 The European Parliament Cases

7.5.1 Case Overview – European Parliament II and III Cases

In its decision in 1979 the *Bundesverfassungsgericht* had held that the 5 percent threshold was valid for European Parliament elections. Following *Organstreit* (organ of state) proceedings and constitutional complaints the Court revisited the constitutionality of the barring clauses (*Sperrklauseln*) again in 2011. By a bare 5-3 majority in EPII the Court ruled that the 5 percent electoral threshold was unconstitutional. In response, the *Bundestag* passed a revised statute authorising a 3 percent threshold for European Parliament elections. EPIII arose from a combination of *Organstreit* proceedings and individual constitutional complaints from voters. There was no automatic presumption on the *BVerfG*'s part that the 3 percent threshold would be unconstitutional as its effects might be different; therefore, a separate substantive assessment was required.⁶⁷⁹ In its 2014 decision, the Court struck down the 3 percent threshold as well, again with a 5-3 majority despite a change in some of the justices in the interim. One of the key questions raised by the EP case decisions was whether it was just a matter of time before the Court struck down the 5 percent threshold for *Bundestag* elections.

Since the *BVerfG* electoral threshold decisions in 2011 and 2014, anti-EU and far right parties have continued to perform increasingly well across Europe, particularly in the EU Parliament elections of 2014. There are numerous critiques of the Court's decisions on their methodological grounds—i.e. that they ignore its previous case law or are based on questionable assumptions. Both of these criticisms are addressed below. However, the larger problem with the Court's decisions, it seems, is that they are based on the premise that when the conditions that justify the *Sperrklausel* change, the decision should be reassessed. This would be reasonable but for the fact that the change

⁶⁷⁹ Silvia Pernice-Warneke, 'Das Urteil des Bundesverfassungsgerichts Zur Drei-Prozent-Sperrklausel im Europawahlrecht—Bundesverfassungsrechtliche und Europarechtliche Fragestellungen mit Prüfungsrelevanz', *JURA-Juristische Ausbildung*, 36, (2014), 1144-45.

in conditions—that is to say, the increase in the powers of the European Parliament, and the greater threat of right-ring parties since its previous decision in 1979—*has* changed. However, that change was in a direction which according to the logic of the Court’s previous decisions—which emphasised the need to maintain stability and preserve the ability of a legislature to function—would have suggested there was *even more* cause to maintain the electoral hurdle, not strike them down. In this section and the next, I will assess the decisions and the dissents in the EP cases, and the criticisms from commentators and even a former president of the Court, and ask whether a decision which restores the important principle of electoral equality—or ‘one man one vote’⁶⁸⁰, as a German commentator wrote—fits the model of German constitutionalism advanced thus far if it threatens stability and when its rationale seems arbitrary and opaque.

In the European Parliament II case of 2011, the Court further demonstrated its willingness to jettison long-standing aspects of its jurisprudence in response to a perceived change in circumstances.

A barring clause once perceived as permissible may not, in consequence, be regarded as constitutional in perpetuity. Rather, a different constitutional judgement may arise if circumstances materially change. If the electoral lawmaker finds him or herself in changed conditions in this sense, so he or she must take them into account. Only the current circumstances are relevant to the question of further retention of the barring clause.⁶⁸¹

The decision to hold the 5 percent electoral threshold as unconstitutional took many commentators of German constitutional law by surprise. As Strohmeier noted:

Even though changes in the case law of the *BVerfG*, especially in the area of electoral law, are by now less the exception and rather more the rule, this turnaround is especially surprising.⁶⁸²

Although less direct than Schlink’s critique of the Court, Strohmeier’s remarks are suggestive of the less methodologically consistent style of decision-making from the Court that Schlink critiqued. Such surprises cut against the grain of what we imagine the purpose of constitutionalism to be about—to reduce uncertainty.⁶⁸³ A decision

⁶⁸⁰ See *infra* note 706.

⁶⁸¹ *European Parliament II Case*

⁶⁸² Gerd Strohmeier, 'Funktioniert Weimar Auf EU-Ebene? Reflektionen Zur Europawahl 2014 Ohne Sperrklausel', *ZfP Zeitschrift für Politik*, 61, (2014), 352. My translation from “*Auch wenn Rechtsprechungsänderungen des BVerfG, gerade im Bereich des Wahlrechts, mittlerweile weniger die Ausnahme, sonder vielmehr die Regel darstellen, überrascht diese Kehrtwende in besonderer Weise.*”

⁶⁸³ See for example Kay, pp. 22-27.

expanding the scope of equality which might be seen by many public commentators as progressive and positive becomes more disconcerting if it has been arrived at through a process that seems arbitrary or has been based on questionable assumptions. Both of these complaints seem relevant to the Court's 2011 and 2014 EP decisions.

Aside from such a significant change in the Court's case law being based on a bare (5-3) majority of the Court, also highlighted was the effect that abolishing the 5 percent hurdle would have on the ability of the EP to form a majority on certain issues. Contrary to the logic behind the *BVerfG* ruling, the existing fragmentation of the EP is already very high, and a majority of the members can often only be achieved through cooperation of both of the largest parliamentary groupings.⁶⁸⁴ The ghosts of Weimar continue to animate debates over the necessity of particular features of the militant democracy, perhaps none more so than the capacity of a parliament to function, and the political consequences when it is unable to.

In the *Bundestag*, one member of the CDU argued that without the 5 percent hurdle, the 13 or 14 parties which would then come from Germany would be those which

neither belong to the party families, which could join together with political groups in the European Parliament, nor be integrated within them. In this respect, without the barring clause, we would produce a number of non-attached parliamentarians who could significantly endanger the institution's increasingly important function of cooperation.⁶⁸⁵

The criticism of the decision, then, is that in contrast to when the Court last looked at this question in 1979 and upheld the 5 percent hurdle, the direction of travel has been towards a more powerful EU parliament where its ability to function matters far more now than it did for the weaker parliament of the late 1970s.

In its ruling striking down the three percent threshold for European elections, the key words in the decision—repeated 37 times each—were ‘*Wahlrechtsgleichheit*’ (‘electoral equality’) and ‘*Chancengleichheit*’ (‘equal opportunity’); the broader context

⁶⁸⁴ Strohmeier, 'Funktioniert Weimar Auf EU-Ebene? Reflektionen Zur Europawahl 2014 Ohne Sperrklausel', pp. 355-56.

⁶⁸⁵ Reinhard Grindel, 'Plenarprotokoll 17/246, 31432', (Berlin: Deutscher Bundestag, 2013). My translation from: “*die weder den Parteifamilien angehören, die sich im Europäischen Parlament zu Fraktionen zusammenfinden, noch von diesen integriert werden könnten. Insofern würden wir ohne Sperrklausel eine Zahl von fraktionslosen Parlamentariern produzieren, die das immer wichtigere Funktionieren des Zusammenwirkens der Institutionen massiv gefährden könnten.*”

in which the Court invoked these principles—repeated 5 times—was “*die Grundsätze der Wahlrechtsgleichheit und Chancengleichheit der politischen Parteien*” (the fundamental principles of electoral equality and equal opportunities among political parties). According to one commentator, the main principle enunciated in the Court’s opinion was nothing less than “the fundamental idea of democracy itself – one man, one vote.”⁶⁸⁶

In justifying its decision in *EP III*, the majority opinion argued that electoral law was subject to a high standard of constitutional review.

The design of electoral law is subject to strict constitutional review. This follows from the general consideration that, in a way, the parliamentary majority acts in its own interest with regulations that affect the conditions of political competition, and that the risk that the respective parliamentary majority is guided by the aim to preserve its power, instead of considerations of the common good, is especially high in electoral law..⁶⁸⁷

The reference to the ‘common good’ reflects both its Aristotelian polis conception of the Basic Law, and the already stated commitment of the Court to maintain a vibrant political opposition.

The Court then argued that while a threshold could be justified “for the election and continued support of a viable government,” such an aspiration at the EP level is “still in its infancy”.⁶⁸⁸ In other words, the lack of a government attached to the European Parliament meant, the Court implied, that the Parliament could tolerate a level of party fragmentation which would be unacceptable in the *Bundestag*:

An actual impact on the European Parliament's ability to function is currently not foreseeable, which means that there is no basis for the legislature's prognosis that, without the three-percent electoral threshold, an impairment of the European Parliament's functioning is looming.⁶⁸⁹

The dissent by Justice Mueller in *EP III* sees the Court as having replaced the judgment of the legislature with its own:

⁶⁸⁶ Christian Siedenbiedel, 'Demokratie Muss Nicht Effizient Sein', in *Frankfurter Allgemeine Zeitung*, (Frankfurt, 2014).

⁶⁸⁷ *European Parliament III Case*

⁶⁸⁸ Ibid.

⁶⁸⁹ Ibid.

It is not for the *Bundesverfassungsgericht* to replace the reasonable decision of the legislature with its own reasonable decision. Ultimately, the Senate's decision leads to accepting the risk of an impairment of the European Parliament's functioning for the duration of at least one election period. I cannot perceive this as a constitutional requirement. The impairment of the European Parliament's ability to function is sufficiently important to justify an interference with the principles of electoral equality and equal opportunities of political parties.⁶⁹⁰

The difference in emphasis between on the one hand, the majority opinion, and on the other, the dissenting opinion and the views of the federal government hinges on the word 'foreseeable'. For the majority opinion, the lack of a foreseeable threat to stability meant that the high cost of interfering with the democratic will of the people through an electoral threshold was unjustified. Yet it was the unforeseeable implications of removing the threshold on the ability of the European Parliament to function which dismayed the dissenting justices, the federal government, and EU officials.⁶⁹¹ Equally perplexing were the Court's prognostications (below) in EPIII regarding how the decisions might affect voter behaviour. By any standard of evaluating judicial decisions, this seems speculative.

It is also possible that clearer political differences between the individual parliamentary groups will increase their internal cohesion. In addition, a changed perception of the European Parliament, resulting from raising the party-specific profiles more strongly, might induce voters more than previously to vote strategically and thus counteract an increase in the number of parties represented in the European Parliament.⁶⁹²

The critique of the Court, then, is that it has substituted its highly speculative judgments and knowledge for that of the *Bundestag* with regard to the workings of the European Parliament, while accepting the risk of smaller parties frustrating the formation of a functional majority.

One particular criticism of the Court's decision to strike down the 5 percent threshold in European Parliament II Case (2011) is that its justification for the decision

⁶⁹⁰ Ibid.

⁶⁹¹ Reacting to the decision, Günther Oettinger, Germany's EU commissioner, said "the ruling is backward-looking. [...] I am certain that Karlsruhe will have to correct its case law in 10 years." 'Is Germany's High Court Anti-European?', in *Spiegel Online*, (2014).

⁶⁹² *European Parliament III Case*

painted a picture of the EP not as it was in 2011 but as it was in 1979.⁶⁹³ What was peculiar, according to Strohmeier, was that the significant expansion of the EP's powers and competencies since the *BVerfG* upheld the 5 percent threshold in 1979 logically pointed in completely the *opposite* direction to its 2011 decision striking it down.⁶⁹⁴ The Court's argument was that the EU Parliament did not have a government attached to it and, thus, it was less dependent on the formation of a stable majority to function. However, as Strohmeier notes, that logic more accurately reflected the weakness of the EP in 1979 when the Court last decided the issue, but not the more powerful parliament of 2011. The whole point of *Sperrklauseln* is to allow a parliament to function by ensuring that splinter parties cannot get into Parliament and so bring the system to a halt. Thus, for Strohmeier, the 1979 decision upholding the *Sperrklauseln* better fitted the circumstances of today while the 2011 decision better reflected the conditions in 1979.⁶⁹⁵

If the conditions which the Court highlighted to justify its decision actually suggest the opposite—as three dissenting justices also suggested—did the decision simply represent a misunderstanding on the part of the *BVerfG* of how the EP functions and democracy works at the EU level, or was there some other basis for it? The Court's decision seems to speak less about the intricacies of how the EP functions *and* reaches decisions, and more about changing times and the impermissibility of restricting the principle of equal suffrage or equal opportunity between parties without good reason.

Two of the three dissenting justices criticised the decision of the Court's Second Senate for accepting a “possible impairment of the European Parliament's ability to function in spite of its increased political responsibility.”⁶⁹⁶ Directly addressing the point that circumstances supported the 5 percent threshold even more than in 1979, the dissenting justices noted, 1) that the majority on the Court had chosen to strike down the blocking clause despite the growth in the EP's competences and its increasing political significance, suggesting even more justification for maintaining it than in 1979; 2) that the Court had taken the decision without explaining how the standards of assessment had changed since 1979.⁶⁹⁷ In its language striking down the 5 percent hurdle, the *BVerfG* has emphasised the heavy toll that barring clauses exact on popular sovereignty and the constitutional right of all Germans to participate in their representative

⁶⁹³ Strohmeier, 'Funktioniert Weimar Auf EU-Ebene? Reflektionen Zur Europawahl 2014 Ohne Sperrklausel', p. 352.

⁶⁹⁴ Ibid.

⁶⁹⁵ Ibid.

⁶⁹⁶ *European Parliament II Case*

⁶⁹⁷ Ibid.

democracy. The apparent error in the Court holding that an impact on the Parliament's ability to function was not "foreseeable" was illustrated only a couple of months later.

7.6 Implications and Aftermath of the Decisions

In the EU Parliament elections of 2014, eurosceptic parties doubled their representation compared to 2009.⁶⁹⁸ Apart from UKIP's strong showing, France's National Front won 24 out of 74 seats, making it the largest French party in the EP.⁶⁹⁹ Seven German political parties from the left and right won one seat each in 2014 as a result of the *BVerfG* decisions in 2011 and 2014, including the first Neo-Nazi representative to come from Germany. Given these events, it is arguable that the *BVerfG* too cavalierly dismissed concerns over the impact that removing the 5 percent threshold would have on stability. Thus, instability and the absence of threats in the political environment preceding the abolition of the 5 percent and 3 percent thresholds might suddenly be manifested as a result of its removal. This instability might be both as a result of the destabilizing effects on the EP itself and on German domestic politics as more extreme parties are given a higher profile by the result.

It was certainly the case that eurosceptic parties such as *Alternativ für Deutschland* praised the *BVerfG* decision, calling it "a good signal for democracy in Europe."⁷⁰⁰ The *Sperrklauseln* decisions of 2011 and 2014 thus bring us back to the scholarly critiques of those decisions, of the Court's role in German political life, and of the increasingly unpredictable manner in which it seems to be making decisions. One possible explanation may lie in the increasingly normative bent of German constitutional jurisprudence highlighted by Kommers: that Germans no longer see the Basic Law as "the simple expression of an existential order of power" but as "fundamentally a normative constitution embracing values, rights and duties."⁷⁰¹ In other words, that the Court is prioritising normative preferences over what the situation demands. The distinctly normative tenor of the Basic Law has been an important feature of German constitutionalism since 1949. Yet absent a reasonably consistent *BVerfG* methodology where deviations from its existing case law are convincingly justified, judicially created values may be a fickle orienting star in changing circumstances.

⁶⁹⁸ 'How Eurosceptic is the New European Parliament?', (London: BBC, 2014).

⁶⁹⁹ 'Eurosceptic Effect at the European Parliament: Key Issues for the 2015 Parliament', (London: UK Parliament, 2014).

⁷⁰⁰ 'Drei-Prozent-Hürde bei Europawahl Verfassungswidrig', in *WeltN25*, (Berlin, 2014).

⁷⁰¹ Kommers and Miller, p. 45.

There are several critiques of the Court's decision to strike down the 5 percent *Sperrklausel* for EP elections. First is that the decision did not sufficiently pay attention to the difficulties that could come from the splintering effect of many smaller parties entering the EP and preventing the formation of a majority within the EP.⁷⁰² Second, is the actual threat to political stability in Germany that could arise due to the higher profile that extremist parties would gain through a seat in the EP. Third, was the due respect for separation of powers, and the legislative intent and greater knowledge of legislators regarding the possible effects of scrapping the *Sperrklausel* on the EP.⁷⁰³ On this point, two of the dissenting justices in European Parliament II Case noted:⁷⁰⁴

Electoral-law issues are subject to the legislature's political freedom of drafting whose legislative duty imposes restraint on the Federal Constitutional Court with a view to the general nature of the electoral principles.⁷⁰⁵

The concern with the Court's jurisprudence regarding the European Parliament decisions, particularly that of 2014, which overturned the *Bundestag's* considered legislative response to the 2011 decision, is that some of the justices are playing fast and loose with the stability of a supranational parliament on the basis of limited knowledge and questionable suppositions.

Some have argued that the EPIII decision may open up the argument over whether to maintain the (previously sacrosanct) 5 percent hurdle for *Bundestag* elections. One Court observer noted that the *BVerfG* may well have boxed itself into a corner with respect to the EPIII decision, committing it to revisit the constitutionality of the electoral threshold at the domestic level.

Either the *Bundesverfassungsgericht* does not really take the European Parliament seriously, regarding it as a lesser parliament (detractors would say 'a talking shop') for which efficiency is not so important; or the hurdle must be abolished for *Bundestag* elections sooner or later.⁷⁰⁶

⁷⁰² See for example Strohmeier, 'Funktioniert Weimar Auf EU-Ebene? Reflektionen Zur Europawahl 2014 Ohne Sperrklausel'.

⁷⁰³ Some of the founders had wanted the *Sperrklausel* requirement in the Basic Law itself. Eventually it was decided to make it a statutory requirement.

⁷⁰⁴ *European Parliament II Case*

⁷⁰⁵ Ibid.

⁷⁰⁶ Siedenbiedel, (2014). My translation from "Entweder das Bundesverfassungsgericht nimmt das Europaparlament nicht richtig ernst, betrachtet es als ein Minderparlament (böse Zungen sagen: Quatschbude), für das Effizienz nicht so wichtig ist. Oder: Für die Bundestagswahl muss die Hürde

Some writers like Maximilian Steinbeis argue more directly that the democratic cost of maintaining the 5 percent hurdle domestically has become too high.⁷⁰⁷ For Steinbeis, the results of the 2013 elections when, as he puts it, 15 percent of the total votes cast or 7 million votes were thrown in the bin, creates a *Bundestag* that does not accurately reflect what Germany looks like politically.⁷⁰⁸ He believes that as well as simply balancing electoral equality against the ability of a parliament to function, the Court should also include the principle of *Repräsentivität*, and consider in its balancing exercise whether a parliament is a true reflection of a country's political diversity.⁷⁰⁹ Fourteen parties achieved between 0.1 percent of the vote and 4.7 percent of the vote and therefore failed to get a seat in parliament, but only four of these parties achieved 1 percent or more.⁷¹⁰ However, 15 percent of the vote split between 10 or more parties that get seats in the *Bundestag*, would seem precisely the type of Weimar-like situation that would dictate they be excluded. In other words, while there is undoubtedly an increased democratic cost the higher the percentage of votes goes to waste, that in itself would constitute an ever large proportion of the parliament being fragmented into ever smaller parts were the parties to get seats in the parliament.

Kommers and Miller argue that the 'stability' imperative makes the domestic 5 percent threshold safe for now. The *Bundesverfassungsgericht* remains convinced, they argue, that "whatever its cost in democratic terms, the five percent minimum threshold is still necessary to ensure Parliament's stability and efficacy."⁷¹¹ It is this different standard, though, that has so frustrated MEPs and the federal government in Berlin. In other words, that the *BVerfG* was using the EP as a guinea pig by allowing parties into it that it would not tolerate in the *Bundestag*, and without having to deal with the consequences. Indeed, Justice Mueller's dissent about the impairment of the EP's function raises this problem.⁷¹²

früher oder später auch abgeschafft werden."

⁷⁰⁷ Maximilian Steinbeis, 'Ist am Sonntag die Fünfprozenthürde Verfassungswidrig Geworden?', in *Gebändigte Macht: Verfassung Im Europäischen Nationalstaat: Verfassungsblog* ed. by Alexandra Kemmerer, Christoph Möllers, and Maximilian Steinbeis (Baden-Baden: Nomos Verlagsgesellschaft 2015), pp. 45-47.

⁷⁰⁸ Ibid. p. 47.

⁷⁰⁹ Ibid.

⁷¹⁰ 'Endgültiges Amtliches Ergebnis Der Bundestagswahl 2013', (Wiesbaden: Der Bundeswahlleiter, 2013).

⁷¹¹ Kommers and Miller, p. 263.

⁷¹² See *supra* note 690.

The risk if the Court struck down the 5 percent hurdle domestically is that would make it harder for a majority to reach decisions, and would in itself likely prompt further referrals and constitutional complaints to Karlsruhe. The end result in such circumstances might then be a zombie parliament that cannot function, and an ever greater reliance on the Court. A former president of the Court, Hans-Jürgen Papier, sharply criticised the 2014 EPIII decision, calling it “correct neither in its result nor in its argumentation.”⁷¹³ Papier voiced concerns that the 5 percent threshold for *Bundestag* elections might be at risk of being struck down and went on to suggest that a constitutional amendment should be adopted to create clearer conditions for its use, possibly with a view to reintroducing the 5 percent threshold at the EP level and ensuring its remains in place domestically.⁷¹⁴

When an ex-president of the Court argues that the 5 percent threshold should be protected by constitutional amendment from the attention of his former colleagues in Karlsruhe, this suggests at the very least that the justices should re-evaluate their reasoning in the EP cases before turning their attention to the *Bundestag* electoral *Sperrklausel*. The three dissenting opinions in both EPII and EPIII provide a good basis for a change of course, which, as noted by Rinken, is what German constitutional jurisprudence allows for.⁷¹⁵ Moreover, the increased threats to stability across Europe and the greater fragmentation within German politics with the rise of *AfD* certainly represent a change in material conditions, or (*Verhältnisse*), its oft-invoked word for determining whether a change in its case law is in order. The rather ossified German political system that Justice Böckenförde identified in the 1980s may well have needed a shot of adrenalin, which it got with the integration of the Greens into the party system. However, whether in terms of reassessing the EP case decisions or any change to the 5 percent hurdle for *Bundestag* elections, the present ‘conditions’ of fragmentation and far right parties in the ascendancy indicate that a parliament capable of functioning may be more important than judicially administered democratic infusions.

7.7 On the Side of the People

After several high profile *BVerfG* decisions which were seen as anti-European including the Lisbon Treaty decision in 2009 and the abolition of the 5 percent rule for the EP election in 2011, and with decisions pending on the constitutionality of the

⁷¹³ ‘Ex-Verfassungsrichter sieht Fünfprozenthürde in Gefahr’, in *Spiegel Online*, (2014). My translation from: “Das Karlsruher Urteil halte er ‘weder im Ergebnis noch in der Begründung für richtig’”.

⁷¹⁴ Ibid.

⁷¹⁵ See *infra* Note 728.

ECB's bond buying programme, and the constitutionality of the (now) 3 percent hurdle for the EP elections, the Court's president, Andreas Voßkuhle, went to Strasbourg in 2013 to address around 30 members of the European Parliament (MEPs).⁷¹⁶ For two hours, many of the MEPs grilled Voßkuhle about the *BVerfG*'s attitude to the EU, and charged that the Court "doesn't comprehend Europe's idea of democracy". Eventually Voßkuhle hit back, telling the parliamentarians: "Not a single person here has mentioned the words 'citizens' or 'voters'," he said, seeking to rebuke the politicians. "Is your own power the only thing you care about?"⁷¹⁷ President Voßkuhle's comments did not go down well. Since the Court had repeatedly upheld the 5 percent threshold for the German *Bundestag*, the parliamentarians told Voßkuhle that a decision to quash the 3 percent hurdle⁷¹⁸ would send a clear message that European Parliamentary Democracy was inferior to its German counterpart.⁷¹⁹

Recent constitutional tensions have led to criticism that the role of the *BVerfG* as the ultimate arbiter of all legal and constitutional questions has become too overtly political, based on the perception of it adjudicating in ever increasing areas of social policy and politics.⁷²⁰ Responding to these criticisms, including some from the German government in Berlin, Voßkuhle commented that the court is on the side of the people and that without the aid of the legal system they wouldn't have a voice.⁷²¹ Such comments from the most senior judge in Europe's largest country at first seem startling and taken at face value might suggest a lack of faith in Germany's democratic institutions.

In other remarks Voßkuhle argued that the role of the courts is merely to "define parameters within which politics can unfold."⁷²² Even this more 'limited' estimation of the political power of the courts does nothing to dispel the notion of judges as platonic guardians. Although Voßkuhle's comments sound superficially similar to Supreme Court Justice Stephen Breyer's that the Court is the "boundary commission" of the

⁷¹⁶ Is Germany's High Court Anti-European?, (2014).

⁷¹⁷ Ibid.

⁷¹⁸ Which had been passed by the *Bundestag* in response to the 2011 decision.

⁷¹⁹ Collings, p. 291.

⁷²⁰ See for example Reinhard Müller, 'Berliner Gedankenspiele zur Dritten Gewalt', *Frankfurter Allgemeine Zeitung*, (2014).

⁷²¹ Is Germany's High Court Anti-European?, (2014).

⁷²² Andreas Voßkuhle and Wolfert Von Rahden, 'Die Rolle des Bundesverfassungsgerichts in Europa: Ein Gespräch', in *Gegenworte*, (Berlin-Brandenburgische Akademie der Wissenschaften, Herbst 2013). My translation from "*Gerichte können nur den Rahmen abstecken, innerhalb dessen Politik sich entfalten kann.*"

Constitution, they seem to envisage very different judicial roles.⁷²³ Echoing Rostow's idea that "man can be free because the state is not"⁷²⁴, Breyer sees the Constitution as creating a vast open space where citizens can live their lives. For Voßkuhle, however, the role of courts is defining not just the boundaries of political activity, but the playing field as well. Such an expansive view of the judicial role seems surprising to Anglo-American sensibilities. There is inevitably a natural tendency for senior judges to downplay the significance of their roles, not necessarily due to false modesty but because that is honestly how they believe judicial power works, or *should* work. External perspectives, on the other hand, may often attribute too much significance to these courts due to the momentary drama of high profile cases.

All decisions of the *BVerfG* begin with the words, "*In Namen des Volkes*" (In the name of the people). Voßkuhle's view that the Court is on the side of the people may perhaps be more understandable in the historical context of the Karlsruhe Court and the constitutional complaint mechanism. After all, well over a hundred thousand Germans have petitioned the Court since its establishment, even if only around 2 percent of complaints are upheld. Perhaps this statistic tells its own story about the development of German constitutionalism since 1949. That the very possibility of the civic conscious citizen being aware of their fundamental rights and being able to file a constitutional complaint with the Court represented liberal democratic progress. As Rinken puts it, the constitutional complaint procedure "crystallises the importance of the basic rights for the whole constitutional order."⁷²⁵

However, for the president of the *BVerfG* to view the justices as being on the side of the people would seem unthinkable from a senior judge in the United States. Does Voßkuhle perhaps see the *BVerfG* as having a superior relationship with the German people than they have with their elected representatives, or simply a different one? Certainly Voßkuhle is not the first *BVerfG* judge to find fault with Germany's political institutions as Böckenförde's complaint about the oligarchical tendency among the established parties indicates. One potential danger in Germany, though, a society which still has a healthy respect for authority, is that if the German people see the Court as the best means of having their political and social needs addressed, they may feel less

⁷²³ See *supra* note 198.

⁷²⁴ See *supra* note 101.

⁷²⁵ Rinken, p. 66.

need to participate in the mechanisms of representative democracy, and so remain engaged and vigilant in defending their constitutional order.⁷²⁶

7.8 Ivory Tower Decision-Making

One of Bernhard Schlink's concerns in 1994 was not merely the *BVerfG*'s increasingly opaque methodology but the absence of robust critiques of its decisions among German academics. Since Schlink's critique of the Court and the scholarship surrounding its case law, legal and constitutional law scholars have launched powerful broadsides against the Court's rulings in the electoral threshold cases and other contentious decisions.⁷²⁷ In this respect, the common law practice of dissenting and discursive opinions, which are not part of the German civil law tradition but which the Court has embraced since the FCCA was amended to permit them in 1971, has contributed to an improvement in the quality of decision-making. Rinken writes that dissenting opinions have allowed for more transparent decision-making that is "more accessible to journalistic and academic criticism".⁷²⁸ This leaves open a forum for debate which permits re-evaluations of decision-making and an eventual change in the Court's interpretation.⁷²⁹ Some observers of the Court think such open debates cause problems of their own. One is that its open ended opinions and penchant for lengthy *obiter dicta* often fuels debate and controversies with German politics and society rather than settling them.⁷³⁰ Since the purpose of courts is usually thought of as primarily being about settling issues, such debates then invariably convey, often correctly, that the Court is neck deep in the creation of policy.⁷³¹ However, since transparency is usually seen as an important facet of the rule of law, it is hard to see open debate which permits a re-evaluation of the Court's decision-making as necessarily being a negative.

Common to most constitutional courts including Germany's is that a significant majority of its justices are drawn from academia rather than being the type of professional judges found in the ordinary German courts of law. Article 94 of the Basic Law and paragraph 4 of the Federal Constitutional Court Act specifies that three of the

⁷²⁶ See for example Packer, (2014). "A political consensus founded on economic success, with a complacent citizenry, a compliant press, and a vastly popular leader who rarely deviates from public opinion—Merkel's Germany is reminiscent of Eisenhower's America. But what Americans today might envy, with our intimations of national decline, makes thoughtful Germans uneasy. Their democracy is not old enough to be given a rest."

⁷²⁷ See Daniel Halberstam and Christoph Möllers, 'The German Constitutional Court Says' Ja Zu Deutschland!', *German Law Journal*, 10, (2009).

⁷²⁸ Rinken, pp. 71-72.

⁷²⁹ Ibid. p. 72.

⁷³⁰ Blankenburg, pp. 169-70.

⁷³¹ See also Schlink, p. 198.

eight justices from each senate must be chosen from one of the federal supreme courts, leaving the remaining ones to be chosen from the ranks of law professors, bureaucrats and politicians.⁷³² In my interview with him in October 2013, Judge David Edward, a former UK judge of the European Court of Justice, highlighted one of the critiques of the *BVerfG* from judges on the ordinary German courts of law:

The German ordinary courts, the courts of law, are sometimes resistant to the way in which the Constitutional Court makes law [...] that this is a sort of dreaming up law, rather than a rigorous analysis.

The problem that Judge Edward identifies is the idea that the living instrument view of constitutional interpretation has been taken to extremes by constitutional courts in general, and the *BVerfG* in particular.

If you go to the case law of the European Court of Human Rights you'll get exactly the same [idea]: that this is a living instrument which we have to interpret in today's light. But the ordinary courts find this troubling because they feel that the law is being made on the hoof.⁷³³

Such constitutional courts are, as Issacharoff puts it, "little detained by concerns over the authority for judicial review",⁷³⁴ while the counter-majoritarian difficulty becomes "a striking irrelevance"⁷³⁵. The very nature of constitutional courts is, of course, that in monitoring the political process and guarding the gates of democracy, tensions are created with the political branches of government. What is entirely absent in the *BVerfG*'s approach to decision-making is any hint of the American judicial tradition of "self-doubt", of "agonising over legitimacy, or 'exercising the utmost care' whenever 'breaking new ground' in constitutional matters".⁷³⁶ The danger is that the combination of what I call the Court's normative exuberance, its nonchalance with its own case law, its "less consistent legal methodology"⁷³⁷, along with a living instrument approach to constitutional interpretation, may sooner or later become a perfect storm which damages

⁷³² Blankenburg, p. 170.

⁷³³ Interview, Judge David Edward, Edinburgh 2013.

⁷³⁴ Issacharoff, 'Constitutional Courts and Democratic Hedging', p. 964.

⁷³⁵ Somek, p. 15.

⁷³⁶ Wojciech Sadurski, *Rights Before Courts : A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*, (Dordrecht, Netherlands: Springer, 2014), p. xiii.

⁷³⁷ Schlink, p. 215.

its crucial role within Europe's largest democracy. In this respect, as Collings puts it, "the court requires sensibility to history as well as dogma."⁷³⁸

Over time, the Court's case load of constitutional complaints from German citizens grew and, as seen, now represents over ninety percent of its work. Taken together with the potential mutability of human dignity, *BVerfG* President Voßkuhle's comments suggests a growing inclination on the part of the Court that the values of liberal constitutionalism have firmly taken root in German society, allowing it to step back from the more electorally intrusive aspects of militant democracy. Does the Court's decision in the *European Parliament III* case therefore represent a considered analysis on the part of the five justice majority regarding the circumstances in existence at the EP level or, as one of the three dissenting justices argued, has the Court merely replaced "the reasonable decision of the legislature with its own reasonable decision"⁷³⁹? The critique of some German politicians after the two EP decisions is that the *BVerfG* simply has no conception of how democracy functions at the European level. Perhaps a bigger concern for the Court, however, is the suspicion that it does not even understand democracy at the German domestic level.

As part of its general equality jurisprudence—which is functionally similar to the U.S. Equal Protection Clause—the *BVerfG* will review legislation if it differentiates between people (i.e. treats them unequally) without any justification.⁷⁴⁰ This should be unproblematic. However, the Court has expanded the scope of its general equality jurisprudence to review legislation for "consistency, congruity and coherence"⁷⁴¹. The problem, as Collings notes, is that

legislation is often inconsistent for a noble purpose: it is the product of a compromise. Ban legislative incoherence and you risk rendering parliamentary compromise impossible. What's more, parliamentary decisions are supposed to reflect the wishes of the citizenry, and those wishes are themselves often inconsistent. Strip parliaments of the right to act irrationally, and you kill democracy.⁷⁴²

⁷³⁸ Collings, p. 395.

⁷³⁹ *European Parliament III Case*

⁷⁴⁰ This is grounded in Article 3(1) of the Basic Law which states that "All persons shall be equal before the law".

⁷⁴¹ Collings, p. 302.

⁷⁴² *Ibid.*

Baer notes that general equality jurisprudence is based on the doctrine of *Systemgerechtigkeit* which “posits an internal logical coherence of the *Grundgesetz* and evaluates the constitutionality of a law based on its consistency with such logical coherence.”⁷⁴³ This is, as Collings hints at, a high standard of rationality for a legislature to meet.

The dangers of such a doctrinaire approach which, as Collings indicates, effectively outlaws legislative compromise, are manifold. If the *Bundestag* can no longer compromise out of fear of running afoul of Karlsruhe’s edicts and if it can no longer represent the people’s interests politically, then the Court runs the risk of bringing legislative process into the same sort of disrepute as was seen during Weimar due to the splintering effect of smaller parties. The irony then is that while the Court may maintain the 5 percent threshold domestically to ensure the *Bundestag* can still function and to keep out smaller extremist parties, if the legislation produced by that legislature is struck down on the basis of self-reverential Court doctrines like congruence, the reputational damage to the legislature and to Germany’s representative democracy for being unable to resolve pressing social and political problems seems real. Extremist parties like the NPD and rising forces like AfD would certainly be the first to make capital from a perception of legislative impotence.

Throughout his impressive English language history of the *BVerfG*, Justin Collings refers to the president (“*Präsident*”) of the Court as the ‘chief justice’, perhaps to put the continental European nomenclature of judicial titles in terms that an Anglo-American readership might better relate to. Yet the title ‘chief justice’ does not quite convey the respect accorded to the president of the *Bundesverfassungsgericht*. One previous Court president, Roman Herzog, went on to occupy the largely ceremonial position of German federal president and in 2012 Angela Merkel offered the current Court president, Andreas Voßkuhle, the position of federal president. Voßkuhle turned Merkel down. As president of the *BVerfG*, *Cicero* magazine jested, Voßkuhle was already Germany’s “real head of state”.⁷⁴⁴ This comment reflects a strong element of truth, but also a potential problem for the Court. The *BVerfG* wields enormous power and some German politicians have often been eager for the Court to take contentious

⁷⁴³ Susanne Baer, 'Equality: The Jurisprudence of the German Constitutional Court', *Colum. J. Eur. L.*, 5, (1998), 265.

⁷⁴⁴ Collings, p. xxx.

decisions that would have been too politically costly for politicians to take.⁷⁴⁵ This is the problem with the Court's power; it has grown with the eating, while legislators have increasingly retreated from the more politically contentious aspects of constitutional government.

Germany's post-war recovery has been characterised by the gradual shift from stability at all costs to a greater acceptance of renewal, a trend best illustrated by the journey of the Greens from political pariahs to the centre of the political establishment. Integrating the Greens has been one of the Court's undoubted successes and it came, as with the political reaction to its EP rulings, against a backdrop of resistance from the established parties. Does this mean the circumstances are alike? I would argue not. As far as outcomes go, then, the Court's effort to balance stability with renewal and breathe some new life into the German political system through the integration of the Greens and the striking down of the 5 percent thresholds at the EU level can be viewed positively. But—and this is the repeated complaint from Schlink's critique in the 1990s to more recent criticisms from legal scholars and a former *BVerfG* justice—if the Court arrives at these outcomes “more or less politically” rather than through reasoning grounded in the Basic Law it is hard to avoid the conclusion that it has simply become another political institution. In this respect, the Court could perhaps learn from Neil MacCormick's dictum that “not all legal problems can be solved legally” but require “political judgment”⁷⁴⁶. If that is true for law, it is even more certain that not all *political* problems can be solved legally.

Ultimately, the end result of the *BVerfG* striking down the 5 percent threshold may be a shot in the arm for German politics, at least in its manifestation at the European Parliament level. What one can criticise is its methodology—light, outcome driven approach which departed wholesale from the logic of its 1979 decision, but without stating the factors which motivated that departure. When a constitutional court repeatedly delivers surprises—whether pleasant or unpleasant, as Schlink would put it—the suspicion is that it is basing its decisions on some other metric than a constitution. It matters little that the normative outcomes the Court is arriving at are ones which we might agree with when the judicial path to those decisions seems so arbitrary. The danger with such opaqueness in a Court that is upholding a constitution as detailed and

⁷⁴⁵ Ibid. p. 287.

⁷⁴⁶ Neil MacCormick, *Questioning Sovereignty Law, State, and Nation in The European Commonwealth*, (Oxford: Oxford University Press, 1999), p. 119.

specific as the Basic Law is that the justices who today may be promoting electoral equality between voters and equal opportunity between parties may tomorrow be restricting it in an equally *ad hoc* manner. “One of the most serious injuries the state can inflict on its subjects,” Richard Kay writes, “is to commit them to lives of perpetual uncertainty.”⁷⁴⁷ That such uncertainty is currently relatively benign and issues from the ivory towers of the *Bundesverfassungsgericht* rather than the midnight knock at the door from the Gestapo cannot disguise the disconcerting scale of the departure from the stability centric *Weltanschauung* of post-war German constitutionalism.

7.9 Conclusion

In recent decades, the *Bundesverfassungsgericht* has had to continually steer a middle course between its role as guardian of the Basic Law, without it becoming overtly political. It is fair to say it has often steered quite badly. Absent a clear methodology the only real explanation for the Court’s decisions in the European Parliament cases is perhaps a changed understanding on the part of the justices as to what sort of guardianship German democracy and society needs from Karlsruhe in the second decade of the twenty-first century. On one level, the Court may have been responding precisely to the type of charge highlighted by Collings: that it has sometimes done more as the country needed it less. The logic of ‘less’ might well mean striking down those tools of the militant democracy, including electoral thresholds, which a mature and liberal German society has made redundant. This view is certainly implicit in the language of current *BVerfG* president, Andreas Voßkuhle, whose criticism of the MEPs he addressed in Strasbourg was that not once had any of them mentioned ‘citizens’ or ‘voters’.

There is a deep paradox though that in finding, rightly or wrongly, that there was no longer a justification for a 5 percent and then a 3 percent hurdle at the EU level, this change from the status quo looked like exactly the sort of political decision-making the *BVerfG* has so often been criticised for. The Court’s problem here is that ‘doing less’ through removing the electoral hurdles at the EU level actually meant shaking up the political orders at the domestic and European level on a bare 5-3 majority. Moreover, the decision to second-guess the considered judgment of legislators in the *Bundestag*, who had responded to the 2011 decision by instituting a revised 3 percent hurdle at the EU

⁷⁴⁷ Kay, pp. 22-23.

level, seemed to smack of hubris.⁷⁴⁸ The Court's decision seemed as incomprehensible as it was badly timed when just months later eurosceptic far-right parties from across Europe doubled their representation in the European Parliament.

Carl Schmitt and, from a more liberal perspective, Ernst-Wolfgang Böckenförde criticised the 'tyranny of values', which they saw as a poor and potentially dangerous substitute for religion or some other homogenising force like nation as a support for the liberal democratic state. It was dangerous, first, because such a value order compromised liberalism by placing its destiny in the hands of an all-powerful court rather than with the people. The other danger, though, was that the value order came to usurp the Basic Law itself, leaving society at the mercy of the changing whims of constitutional court judges. Set against the backdrop of Andreas Voßkuhle's remarks that the Court is "on the side of the people" and the concerns raised by numerous critics of its second-guessing of legislative decision-making based on a futile quest for coherence and consistency, the risk is that some justices on the Court may be seeing themselves as precisely what one of its former justices, Wiltraut Rupp Von-Brunneck, warned: an *ersatz* legislature⁷⁴⁹.

In this chapter, I have generally offered a critical account of the Court's recent decision-making, particularly with respect to its European Parliament decisions. While one can wholeheartedly agree with the principle—as with the reapportionment cases—that all votes should count equally, the special circumstances of German history require, it could be argued, more sensitivity to political stability than the *BVerfG* has shown. This is not a reflection on the German people of today. Liberal democratic values currently appear stronger in Germany than perhaps any other country in the world at present. The problem is not trust in the people as much as understanding the effects of legislative fragmentation during the Weimar Republic, and recognising the propensity of opportunistic and extremist groups and parties to take advantage of a legislative impasse.

As noted in this chapter and the previous one, the Court's role in upholding fundamental rights and the willingness of Germans to launch constitutional complaints helped cement in the public mind the idea that democratic legitimacy depended on

⁷⁴⁸ Justice Müller's dissenting opinion in *European Parliament III Case* argued that "the assessment of the corridor between the purely theoretical possibility and the certain occurrence of an impairment of the ability to function is reserved to the legislature."

⁷⁴⁹ Collings, p. 288.

respect for legality and human dignity. However, if the ability to petition the Court has helped make the German people better citizens, the reverse may also be true. I think it is possibly also the case that receiving five thousand petitions per year has given the justices in Karlsruhe an insight into the concerns of German society that may not always be as apparent to politicians. The Court's awareness of the type of concerns and issues animating German citizens may also serve as an early warning system for emerging problems in society or with the misuse or misapplication of state power in its dealings with citizens.

Thus, the role of the *BVerfG* in fielding constitutional complaints may be useful in identifying any change in what I have called the 'identity deficit'. In other words, the extent to which citizens identify more or less with their liberal democratic constitutional values in comparison to the traditional "internal bonding forces of society"⁷⁵⁰ such as religion, or nation, that Böckenförde suggested were necessary to sustain liberal democracy. As I have argued through the previous chapters, Germany's *sui generis* nature and its inspiring moral recovery through confronting its traumatic past have lent to the liberal values of human dignity and fundamental rights in German constitutionalism the same force as the more conventional sources of identity and bonding forces identified by Böckenförde. That does not mean that Germany's constitutional order is completely immune to the current ascendancy of populist forces in the West, but its strength is that its citizens identify far more with their liberal democratic constitutional values than with traditional, and often more reactionary, sources of identity.

Der Spiegel noted in 2014 following the European Parliament decisions that the *Bundesverfassungsgericht* was "now criticised as seldom before" and that its justices felt "misunderstood"⁷⁵¹. Yet such tensions should be welcomed if it helps ensure that the Weimar Republic and the regime which followed it remain historical tragedies rather than models to be emulated. With liberal democracy seemingly under renewed threat on both sides of the Atlantic, and around the world, the *Bundesverfassungsgericht* remains a fundamental institution of German democracy. Criticism, contestation, and constructive tension are, I have suggested, the essential attributes of constitutionalism that are needed to maintain the constitutional order in a state of equilibrium. Germans know only too well from the 1930s what happens when that tension dissipates and the

⁷⁵⁰ Böckenförde, p. 46.

⁷⁵¹ 'Die Anmaßung', in *Spiegel Online*, (Hamburg, 2014).

balance is tipped. That is why, despite the critiques I have highlighted, the German people would undoubtedly reject a Germany without the *Bundesverfassungsgericht* as much as they would reject a Germany without their *Grundgesetz*, a constitution that they did not ask for, were not consulted on, but which they have, like the red robed justices in Karlsruhe, come to appreciate.

The Court has experienced crises approximately every twenty years since its establishment in 1951, yet all seem to blow over leaving the relationship of trust it has with the German people undiminished.⁷⁵² The concern would be if Germans respected the Court solely because they respected authority. This does not seem to be the case. For Collings, “the Court’s remarkable rise and the public’s remarkable trust in the Court have been the product, not of some persistent national sequacity and deference to authority, but of the Court’s perceived role in redeeming the country from its authoritarian past and restoring it to the community of liberal democracies.”⁷⁵³

One might even say that the Court itself has taken on a quasi-religious character such is the trust that it is held in with the German people. Given Böckenförde’s original concerns about the social cohesion difficulties the liberal secular state might face without religion, one irony is that the Court is now trusted more than the Pope or any church or religion in the country. According to a 2016 opinion survey, 72 percent of respondents trust the Court as an institution, more than any other part of the government.⁷⁵⁴ Perhaps, then, the Court itself has seemingly filled the religious void that Böckenförde highlighted.

⁷⁵² Collings.

⁷⁵³ Ibid. p. xxxii.

⁷⁵⁴ ‘Wem Die Deutschen Am Meisten Vertrauen’, in *Stern*, (Hamburg: Stern.de GmbH, 2016). The Pope could only manage 50%, with evangelical churches on 45% and the Catholic Church on just 27%.

Chapter 8 - Conclusion

Germany and America are bound by values – democracy, freedom, as well as respect for the rule of law and the dignity of the individual, regardless of their origin, skin colour, creed, gender, sexual orientation, or political views. On the basis of these values, I offer close cooperation to the future president of the United States of America. (Angela Merkel, 9 November 2016)

A constitutional government will always be a weak government when compared with an arbitrary one. There will be many desirable things, as well as undesirable, which are easy for a despotism but impossible elsewhere. Constitutionalism suffers from the defects inherent in its own merits. Because it cannot do some evil it is precluded from doing some good. Shall we, then, forego the good to prevent the evil, or shall we submit to the evil to secure the good? This is the fundamental practical question of all constitutionalism. It is the foremost issue in the present political world; and it is amazing, and to many of us very alarming, to consider to what insufferable barbarities nation after nation today is showing a willingness to submit, for the recompense it thinks it is getting or hopes to get from an arbitrary government.⁷⁵⁵ (Charles McIlwain, ‘The Messenger Lectures’ - 1938-39).

⁷⁵⁵ McIlwain, p. 30. Drawn from six lectures given by the author at Cornell in 1938-39.

The central dilemma which this investigation has sought to address is the paradox that the state is dependent on its citizens for its survival, but they are ultimately dependent on the state for their liberty. Despite its flaws, representative democracy remains the essential vehicle in the modern state by which citizens can play a role in how they are governed, in order to maintain their own freedoms. The role of constitutional courts, then, whether in the guise of the Supreme Court or the *Bundesverfassungsgericht*, has been to a lesser or greater extent to scrutinise this democratic process when called upon to do so.

What I have argued is that the particular characteristics of each country's constitutionalism—whether it is more inclined towards liberty or dignity—have determined the nature of the polis that was established. This, in turn, has determined how interventions in the processes of representative democracy occur, and whether values are formalised or inculcated. The problem, though, as I have emphasised throughout, is that in establishing the terms and (liberty or dignity imbued-) parameters of the polis, constitutionalism creates a civic space, and a legal / institutional space. Thus, the net effect, and accepted ideology of the American constitution was the creation of a zone of liberty where, as Rostow put it, man can be free because the state is not; this, however created a disconnect between the freedom of the citizen, and the activities or “political action”⁷⁵⁶ which was required of them to uphold their representative government and the state.

8.1 Distinctive Features of the Thesis

The enquiry undertaken in the preceding chapters has sought to illuminate distinctive aspects of American and German constitutionalism. The case studies examined addressed the constitutionality of the apportionment of electoral districts at the U.S. state and federal level, and of German statutory rules for electoral success, but through an analysis of the historical development of constitutionalism in each country. The novelty of such a comparative analysis was that it examined both the theory of American and German constitutionalism and the practical impact of these respective ‘constitutionalisms’ on the electoral and democratic processes of each country.

A key aim of the analysis was to focus on the much understudied question of why, to a greater or lesser extent, particular aspects of American and German representative democracy became subject to judicial scrutiny in the way they did, and

⁷⁵⁶ Somek, p. 283.

how the historical development of constitutionalism in each country shaped that process. Moreover, the U.S. reapportionment cases of the 1960s and Germany's electoral threshold cases of 2011 and 2014 have not been examined in depth within a single comparative study before.

8.1.1 Comparative Reading of the Two Courts

The distinctiveness of the comparative analysis of the two courts has been shown in four main ways. Firstly, the responses of each court to the reapportionment and electoral threshold cases was primarily shaped by the liberty-dignity facets of American and German constitutionalism. Thus, as noted earlier, because democracy in the German context was derived from the Basic Law's architectonic principle, human dignity, and because the *Bundesverfassungsgericht's* authority is textually grounded in the constitution, the Court neither faced the scale of criticism that the Supreme Court did in the reapportionment cases nor did it have to justify its role in restoring its notion of electoral equality in *EPH Case* and *EPH Case* as the Supreme Court had to in *Baker v Carr* and *Reynolds v Sims*.

Secondly, a unique feature of the argument was the dichotomy between the *formalisation of values* by the Supreme Court in American constitutionalism arising out of the state of liberty in the civic space, and the *inculcation of values* into the civic space by the *BVerfG* in German constitutionalism. One inspiration for the concept of value formalisation by the Supreme Court was Tocqueville's idea that once a majority of the community comes to accept a new value orientation in society those who were in opposition fall in behind the new consensus.⁷⁵⁷ Thus, on multiple issues, the Supreme Court generally lagged behind rather than led democratic debates and civil society struggles regarding human rights issues. This was true with respect to issues including slavery, segregation and redistributionist policies during the progressive era which were only belatedly formalised in court decisions.

Third, the distinctive stability / renewal paradigm examined throughout the thesis provides an additional comparative lens with which to assess the actions of both courts. A key focus of the analysis was the relationship between legal and democratic institutions in the modern state and the role of constitutionalism and the courts in sustaining a constructive tension between the need for stability and the demands of a changing society. The Supreme Court and *BVerfG*, respectively, have either recognised

⁷⁵⁷ See *supra* note 491.

an evolving conception of equality or dignity in society⁷⁵⁸, or, have rejected absolute stability through the rejection of any notion of timeless validity⁷⁵⁹ to understandings of human dignity.

Fourth, the liberty-dignity dynamic also informs another distinctive dimension of the comparative analysis of the courts: the views of Associate Justice Stephen Breyer of the Supreme Court, and *BVerfG* president, Andreas Voßkuhle on the role of their respective courts within society and politics. Breyer's view of the Supreme Court as the "boundary commission"⁷⁶⁰ of the Constitution sees, I have suggested, a minimalist role for the Court within America's liberty framed constitutionalism that leaves a vast space for citizens to live their lives. By contrast, Voßkuhle's view of the role of German courts as defining the parameters within which politics can unfold⁷⁶¹ fits, I have argued, the more comprehensive dignity orientation of German constitutionalism where rights are a necessary precondition⁷⁶² for democracy.

8.1.2 Other Distinctive Features

The distinctiveness in the analytical approach undertaken involved, firstly, an explanation of the theoretical distinction between the civic and institutional space, and how the interaction between each space works differently in the liberty-centric American constitutionalism, where emerging norms in the civic space have been largely formalised by the Supreme Court as constitutional values, and the dignity oriented German constitutionalism where constitutional values have been inculcated in the civic space, particularly through the constitutional complaint mechanism.

Secondly, the distinctiveness of the thesis involved a clarification of the practical dichotomy between, on the one hand, the theoretical risk to liberal democracy from unlimited democratic access which allows anti-democrats or illiberal autocrats to take control, or more restricted access which may lead to an ossified and oligarchical polity, and on the other hand, how the U.S. Supreme Court and the *Bundesverfassungsgericht* have practically attempted to manage these 'theoretical risks' through their interventions in US districting policies and Germany electoral processes. A further distinctive element of this analysis included the question of how the Supreme

⁷⁵⁸ See *supra* notes 134 (and main text), and 448 (and main text).

⁷⁵⁹ See *supra* note 554.

⁷⁶⁰ See *supra* note 198.

⁷⁶¹ See *supra* note 722.

⁷⁶² See *supra* note 140.

Court and *BVerfG* have dealt with oligarchical tendencies which have attempted to exclude certain voters or parties from the processes of democratic politics; this was seen through the dilution of votes through malapportionment, through the discrimination against the German Greens in the *Bundestag*, and, of course, the effective nullification of votes that fail to exceed a minimum threshold for electoral success.

The interview with the former European Court of Justice judge, David Edward QC, provided a uniquely original insight into both the juridical view of constitutionalism, human rights and law after 1945 (Chapter 2). Additionally, Judge Edward's interactions with German judges while on the ECJ highlighted some of the particular methodological criticisms from the ordinary German courts with respect to the way in which the *BVerfG* reaches some of its decisions (Chapter 7).

The utilisation of Ernst-Wolfgang Böckenförde's ideas in Chapter 3 and throughout the thesis in relation to German and American constitutionalism represented one of the most distinctive aspects of the analysis. The significance of Böckenförde's ideas as manifested in 'the Böckenförde Dilemma'—that "the liberal, secularised state is nourished by presuppositions that it cannot itself guarantee"—has been somewhat neglected outside Germany, yet its relevance for the relationship between citizen and state in all liberal democracies is especially pertinent. The continued relevance of Böckenförde's ideas to current political challenges in Germany and beyond was highlighted only recently by Angela Merkel, who directly referred to Böckenförde and his ideas, and commented on their implications for the role of citizens and civil society in liberal democratic states. Merkel indicated that the implications of Böckenförde's dilemma was that nobody feels they are responsible for their society.⁷⁶³ In response, Merkel praised those Germans taking part in a number of Sunday demonstrations in support of the European idea and said that such civil society involvement was indispensable.⁷⁶⁴

8.2 Comparison

One of the key puzzles which this thesis has examined is how constitutionalism provides a means of dealing with such overt threats to democratic processes as 1930s Germany, or such pernicious long-term threats as malapportionment. Here I have argued that the response of American or German constitutionalism is partly contingent

⁷⁶³ Bernhard Walker, 'Ein Freundliches Signal in Richtung FDP', in *Badische Zeitung*, (Freiburg, 2017).

⁷⁶⁴ *Ibid.*

on the nature of the original constituent act, the circumstances in which the polity was established and how that shaped the constitutional text produced. The circumstances of the U.S. founding which was effectively a compromise between significantly different interests created a more general constitutional text which, partly through omission and part design, restrained the state but left the citizen free.⁷⁶⁵ It is this ‘liberty’ consciousness within American constitutionalism which tends to lead to a more tentative application of judicial authority. In the case of Germany—where a predominantly normative constitution was designed to preserve human dignity and create a resistant state and a society of liberal democrats—judicial power was applied more assertively.

Important for both countries is the need for a vigilant citizenry, familiar with their constitution, its values and the principle of “equal concern and respect”⁷⁶⁶ upon which their liberty and the freedom of others ultimately depends. To this extent, whether it is a constitutional court that is instructing its citizens and politicians on the constitution and civics, what matters most is that *some* institution is doing it. Moreover, if the principles of the polis are accepted by citizens and political actors, it seems to matter less whether it was created by a court out of an objective order of values than whether the citizens charged with safekeeping it in the present are doing a good job.

Both of the case studies have looked at the question of citizen participation and exclusion from the civic space, and the role of the courts in addressing this issue. Due to the constraints of this thesis, the analysis has been confined to the problem of citizens being excluded from the civic space by external actors, either unconstitutionally or constitutionally (i.e. the U.S. states, or the German state); it has not been possible to explore the very interesting question of when citizens exclude themselves from the civic space through apathy or other factors, or do not engage in their democratic process. Although the thesis has looked at this question indirectly through the ability of American and German constitutionalism and the courts to exert influence over the civic space and support constitutional democracy, the motivations of individual voters has not been considered.

This, however, raises the question of whether self-exclusion from the civic space by the citizen is the fault (or problem) of the citizen, or whether it is primarily the state’s

⁷⁶⁵ See *supra* note 101.

⁷⁶⁶ Bellamy, *Citizenship: A Very Short Introduction*, p. 104.

responsibility for establishing the conditions which are conducive for the citizen to participate in their democracy. Here, in a nutshell is the liberty and dignity dichotomy, which has been at the heart of this enquiry. America's liberty constitutionalism created a zone of autonomy for the citizen, but then it was up to the citizen, individually or through religious and other forms of civic associational practices to stay involved in their government. Germany's dignity oriented constitutionalism had two specific tasks to fulfil in 1949: to create firstly a viable and stable constitutional order that could sustain liberal democracy and promote economic prosperity, and secondly establish a supportive and inclusive democratic culture based on respect for individual rights, without which the first objective, as Dahl indicated, would be vulnerable.⁷⁶⁷

Despite the generality of the American Constitution compared to the Basic Law, it is often outlier groups and those with the most extreme views within a polity who are often most certain what the gaps in the constitutional text imply. Of course, this does not help the judge charged with interpretation, but this is precisely the paradox that Justice Stephen Breyer meant recently about the document leaving "vast space" for people to decide what kind of a nation they want.⁷⁶⁸ Breyer was referring to a civic space within which citizens can participate in building the kind of polis that they want. It is *not* a legal space. This is the difference which has been addressed throughout the thesis between the civic space created by constitutionalism and the more limited legal space in which interpretation occurs. It is only when citizens or groups in the polis find their civic space restricted,—for example, when politicians or legislatures do not reapportion, or when voters find their vote is wasted because they have chosen a party that does not clear the 5 percent hurdle—that the courts must step in.

The *BVerfG's* rejection of any interpretation of human dignity based on a timeless validity is Holmesian in its organic and evolutionary conception of constitutional meaning. The surprise decisions in the electoral threshold cases in 2011 and 2014 represent just such an organic conception of constitutionalism but, I think, taken to an extreme that Holmes would have balked at. The German Basic Law was, after all, not a compromise between different views as was the American Constitution, but rather an unambiguous normative battering ram intended to safeguard the state and inculcate its liberal democratic values in society. Whether the Court now sees its role as to 'normalise' a German identity which it feels, based on the EP decisions, no longer

⁷⁶⁷ Dahl, *How Democratic is The American Constitution?*, pp. 95-96.

⁷⁶⁸ Justice Stephen Breyer, (2016).

needs the restraints of the militant democracy, or whether it is in search of some new value system is unclear.

8.3 United States

In the reapportionment cases, upholding their representative government was what civil society actors and individual voters had been attempting to do for decades. In the United States, engaged civil society actors were involved in the unsuccessful political efforts against malapportionment, and then the successful legal effort to get *Baker v Carr* heard in the federal courts. Sager rightly notes that many observers of constitutional institutions are “strongly inclined to see the insulation of constitutional judgment from ongoing politics as a virtue, not a liability.”⁷⁶⁹ The complaint about the *Bundesverfassungsgericht* and the U.S. Supreme Court, however, is that they are not divorced from politics enough. Indeed, Dahl’s view of the Court as a majoritarian and policy making institution suggests that the insulation of the judicial branch from ordinary politics is non-existent.

Decisions such as *Citizens United* would have likely only strengthened Dahl’s convictions. Writing about the backlash against judicial constitutionalism in the wake of the social and progressive rulings of the Warren Court, Post and Siegel highlighted the question of whether the public might lose confidence in the authority of the courts to declare constitutional law if they are seen “to yield to political pressure.”⁷⁷⁰ There are different ways of seeing this, however. In the reapportionment cases, the Court was reacting to widespread concern among civil society actors about malapportionment, yet its decisions certainly found favour with the Kennedy Administration, as they probably would have with the Eisenhower Administration based on the early support from J. Lee Rankin.⁷⁷¹ Notwithstanding Oliver Wendell Holmes’ view on the necessity of judicial review to check states’ laws and Whittington’s analysis of how the Court has often acted as an agent of national power against the states, the Warren Court’s decisions on reapportionment were neither dictated by the federal government, nor opposed by the public.⁷⁷²

The nature of the civic space created by each constitutionalism determines how political action and interpretation takes place. This, however, is determined by whether

⁷⁶⁹ Sager, p. 236.

⁷⁷⁰ Robert Post and Reva Siegel, 'Roe Rage: Democratic Constitutionalism and Backlash', *Harv. CR-CLL Rev.*, 42, (2007), p.375.

⁷⁷¹ See *supra* note 417.

⁷⁷² See *supra* note 475 and 476 and text.

the original constitution established—through sins of omission or design—is an American liberty oriented polis or a German dignity/normative focused one. As seen in Chapter 4, it was the generality of the Janus-facing constitution that created opportunities, but also problems when people came to interpret. The U.S. Constitution began with a compact between thirteen sovereign states, but just as significant was the compromise between the widely differing interests within those states.⁷⁷³ The compromises necessary to bridge the differences between these interests was channelled into a document that few were happy with and which profoundly dismayed Madison. It was from such meagre ingredients, which the compromises of the founding period produced, that the people, representatives, and institutions of the U.S. were commanded to go forth and fashion a viable constitutional order. While these principles of the American constitutional experiment have remained largely unaltered in theory, the societal context in which they have been interpreted has changed dramatically.

The Bickelian angst over the countermajoritarian difficulty is a result of the original constitution generality over what the document means. These tensions were behind the Court's problems during the *Lochner* era, and its subsequent clash with Franklin Roosevelt over his new deal legislation. Justice Holmes' dissent in *Lochner* that a constitution is for "people of fundamentally different views" and did not prescribe eternally applicable economic theories rejected both the notion of a unitary constitutional intent, and the presumption that experience and the changing needs of society had nothing to teach constitutional interpretation.

8.4 Germany

The role of constitutionalism and the courts in ensuring that the institutions of representative democracy functioned as intended has been central to this enquiry. Yet in both the United States and Germany, constitutional values, traditional sources of cohesion, and the balance between majority and minority interests have shaped this institutional narrative in important ways. The emergence of a strong constitutional culture in Germany has been important in sustaining post-war constitutionalism, yet for the first decades of the Federal Republic this was shaped overwhelmingly by the country's framers, politicians, elites and, perhaps most significantly, the *Bundesverfassungsgericht*. However much Germany's weak constitutional culture required this civic pedagogy in 1951, there is an obvious short-term price to be paid in

⁷⁷³ The vote to approve the Constitution in the New York ratifying convention was carried by only three votes. As Akhil Amar has noted, without New York, the Constitution could not have worked.

“liberalness”⁷⁷⁴, as Böckenförde noted, to ensure a citizenry who are able to uphold their liberty in the future. The ‘fine line’ is ensuring that political institutions do not become captured by oligarchical tendencies once it is clear that the stability of the state is no longer at risk. Through *Organstreit* complaints filed by the Green Party during the 1980s and a series of decisions which criticised the established parties for oligarchical tendencies, the *BVerfG* was able to inject new life into Germany’s staid party system.

The Böckenförde dilemma has immense relevance for how a constitutional order should respond to the forces of renewal in society. As has been suggested in previous chapters, the constitutional complaint mechanism of the Basic Law possibly gives the *BVerfG* an insight into emerging trends and tensions within German society which politicians may be less aware of. These trends may reflect threats, or new, emerging, or existing forces of social cohesion or disruption. Taking democracy seriously in Germany has hitherto meant German citizens trusting in the Court to maintain stability using the tools of the militant democracy, and deciding whether the forces of ‘renewal’ are ones which can be safely integrated within the constitutional order of the Basic Law as the Greens were in the 1980s, or whether they must be resisted as the SRP and KPD were in the 1950s.⁷⁷⁵

If courts become too immersed in policy-making, political issues, or answering important questions that society and political representatives should be grappling with—due to activism on the courts’ part or due to legislators using the courts to take politically difficult decisions⁷⁷⁶—then voters may get complacent about engaging in democratic processes and taking the trouble to elect representatives who are committed to public life and to solving complex issues. The danger, then, is that apathy breeds carelessness and the mistakes of the 1930s in Germany become more, not less, likely. I am not convinced, though, that this is what has happened, at least in Germany. As Rolf Lamprecht put it,

The common civil right in being able to call upon Karlsruhe at any time helped foster democratic self-confidence. Whoever recognised this possibility, and, if necessary, made use of it, no longer had to view themselves as subjects.⁷⁷⁷

⁷⁷⁴ Böckenförde, p. 45.

⁷⁷⁵ *Socialist Reich Party Case; Communist Party Case*.

⁷⁷⁶ George I Lovell, *Legislative Deferrals: Statutory Ambiguity, Judicial Power, and American Democracy*, (Cambridge University Press, 2003).

⁷⁷⁷ My translation from: “*Das allgemeine Bürgerrecht, Karlsruhe jederzeit anrufen zu können, schuf*

Due to Germany's unique and traumatic history the values and institutions of German constitutionalism have had to bear an unusually heavy burden in restoring the country's moral core. While Germany retains a strong religious tradition in its culture, and even in its tax code, the country's impressive moral recovery since World War Two seems overwhelmingly driven by secular factors, most especially the willingness of ordinary Germans from the 1960s onwards to acknowledge and debate their country's traumatic past. Had this debate not taken place then Böckenförde's concerns from the 1960s about a value order imposed purely from above could have become a source of tension. Instead, the architectonic values of human dignity and democracy have over time become more deeply entrenched within Germany's constitutional culture, assisted in part by the constitutional complaint mechanism and in part by the debate about the past. The mechanism itself gave Germans a greater civic consciousness and created an awareness among individuals and officials about how the citizen should be treated in the constitutional state. Overall, the values of German constitutionalism seem to have reinforced the process of coming to terms with the past (*Vergangenheitsbewältigung*) by constantly providing both aspirational values and a reminder of what happens when a country loses sight of important moral values.

Throughout the previous chapters I have stressed the *sui generis* nature of the German and American historical experiences which have contributed to the development of constitutionalism in each country. While German exceptionalism may represent constitutional and historical conditions as difficult to replicate as those of American exceptionalism, the extent to which both constitutions have been extensively copied by new democracies around the world makes them essential subjects of analysis if we are to understand how judicial scrutiny of representative democracy should or should not proceed. From an outside perspective, the perceived juridification of the German political and legal space can seem disconcerting. However, in challenging times for Western liberal democracies, where populist and other reactionary forces seem emboldened, it is perhaps useful to observe the institutional constitutional conditions which did so much to establish Germany's strong constitutional democracy when circumstances had perhaps never seen bleaker.

demokratisches Selbstbewußtsein. Wer diese Möglichkeit kannte und notfalls auch wahrnahm, mußte sich nicht länger als Untertan begreifen." Rolf Lamprecht, 'Das Über-Ich der Nation', in *Spiegel Online*, (1998).

Although German democracy has made impressive strides since 1949, the elephant in the room remains the support of ordinary Germans for Hitler in the 1930s. Neil MacCormick observed that legal authority is “empty without general acceptance in a society of the decisions taken by those in authority” and consequently that “without the backing of political power this cannot practically be achieved.”⁷⁷⁸ This has implications for Germany. The authority of the *BVerfG* today is bolstered by the support that it has enjoyed among the German public, the maintenance of which has shielded the institution from more stinging criticism⁷⁷⁹ or attempts to reign in some of its authority. If Germans continue to realise, as Dirk Kurbjuweit suggests, that “they still have to practice democracy” and that they are still on the training programme then they may be less likely to become complacent about protecting their constitutional order. In its first few decades the *BVerfG*’s role was partly to inculcate Germans regarding the majesty of law, but within a hierarchical constitutional order that firmly established individual rights and human dignity as fundamental values. If the role of the Supreme Court was, as I suggested in Chapter 5, one of formalising existing value changes in society, the role of the *BVerfG* from the early 1950s onwards was one of instilling the values of the new constitutional order in German politics and society.

We have come full circle from Bockenforde's dilemma about the liberal, secular state, which illustrated what I would call the identity deficit between the liberal constitutional values which underwrite and characterize state power and the values which ensure social cohesion, be it religion or nation. In Germany, those values of liberal constitutionalism including human dignity, constitutional justice, and the militant democracy which issued forth from Karlsruhe in response to constitutional complaints defied Bockenforde's fears and became over decades important sources of social cohesion and symbols of Germany's moral recovery. However, it is also important to recognize that this recovery in Germany may not have occurred without the *sui generis* debate on the country's traumatic past which erupted in the mid-1960s. Even here though, the Court played a role in laying the groundwork for the later *Vergangenheitsbewältigung* debate with decisions in the 1950s about the Gestapo and the presence of Nazis in the civil service and judiciary.⁷⁸⁰

⁷⁷⁸ Neil MacCormick, 'Sovereignty: Myth and Reality', *Scottish Affairs*, 11, (1995).

⁷⁷⁹ See Is Germany's High Court Anti-European?, (2014).

⁷⁸⁰ *Gestapo Case*, 6 BVerfGE 132 (1957); *Civil Servants Case*, 3 BVerfGE 58 (1953).

Despite all of the critiques of the *BVerfG*'s reasoning identified in the previous chapter—particularly its ivory tower mentality which so vexes both politicians and judges in the ordinary courts of law—such tension must ultimately be regarded as the lesser of two evils given the alternative. The fragile 'Bonn Republic' founded in 1949 survived the initial challenge of internal anti-democratic forces and the external challenge of its Cold War adversaries to become Germany's longest enduring constitutional order. That it remains a stable liberal democratic constitutional order in an era when illiberal democracies are becoming less the exception and more the rule is no small feat. The *BVerfG*'s role in the federal republic's longevity and stability seems clear, as is the continued trust which almost three-quarters of Germans have in it.

8.5 Conclusions

The Böckenförde dilemma that "the liberal, secularised state is nourished by presuppositions that it cannot itself guarantee" illustrates a problem that is no longer unique to Germany: how a state can maintain social cohesion and a system of liberal democratic values without imposing them and thereby compromising its liberalism. Although written as a warning that Germany probably needed a more socially cohesive value system than the *BVerfG*'s objective value order, it highlighted a vulnerability in liberal democratic value systems that has become increasingly apparent with the rise of populist forces in Europe and the United States since the financial crisis of 2008. Without religion or another value system which serves to reinforce the liberal democratic values of the state, the danger is that the citizens start following a value system that is antithetical to the liberal democratic state, or none at all. An electorate that is, to paraphrase Wolin,⁷⁸¹ unduly lethargic in not taking an interest in politics, may be as dangerous to a tolerant and open society as the concerted few seeking to undermine it.

Filling that identity deficit and closing the divide between constitutional values and those of social cohesion will take on different forms in different countries. The importance of a vibrant, inclusive, and broad civil society seems obvious in achieving this reconciliation between values. Although one might be tempted to say that reports of the death of nationalism have been exaggerated, this does not, at least yet, seem like the nationalism of the 1930s. While there are exceptions such as Scotland and Catalonia, the rise of the new nationalism in the first world of Europe and, now, the United States,

⁷⁸¹ Wolin, *The Presence of The Past : Essays on The State and The Constitution*, p. 78.

seems less about the expression of innate nationhood and more about anxiety in the face of global uncertainty, some political disenchantment, and a waning of cultural homogeneity.

While there are various factors at play in explaining why voters in so many wealthy Western countries seem willing to vote for populist, far-right and anti-immigrant parties, the general disenchantment may also be linked to a decline in community, and in those forces of social cohesion which animated Ernst-Wolfgang Böckenförde's concerns. Those on the right in the U.S. decried the 'liberal' decisions of the Warren Court as representing urban and cosmopolitan values and not those of middle America. Through decisions such as *Brown*, *Baker* and *Reynolds*, the jurisprudence handed down by the Warren Court for fifteen years tilted American constitutionalism dramatically towards a conception of human dignity and equality where the emancipated individual was not completely isolated as liberty would dictate.

When Böckenförde made his remarks in 1964, they seemed relevant only to the fragility of liberal values in the Federal Republic. A particular irony is that Germany today is the most politically stable liberal democracy in the western world and has generally bucked the populist trends seen in other countries.⁷⁸² In Germany, the value system of the political system created by the Basic Law seems to have created an unusually strong liberal constitutional democracy and culture from the most inauspicious circumstances.

A reformulation of our understanding of the gap between the public and private spheres which opened up in 1789 may be overdue. One lesson from the political turbulence of 2016 may be that the liberal constitutional values found in the public sphere—that is to say in government and in the legal control of public authority—may not necessarily be cohesive enough to resonate in civil society. Jefferson feared, as Arendt notes, that a paradox existed in republican government which could undermine it. While government was meant to be representative, it could only work if it was present in the lives of the people, rather than only materialising at election times.⁷⁸³ Of course, dangers of autocracy exist in attempting to reconcile the values of the public and

⁷⁸² While Germany has not been immune to populist forces as the increased support for the new eurosceptic party *AfD* illustrates, it is currently polling around 12 percent compared to 34 percent for Merkel's party the CDU, and 23 percent for her coalition partners the SPD. See for example 'Sonntagsfrage Bundestagswahl', in *Wahlen, Wahlrecht und Wahlsysteme*, (Hamburg: Wahlrecht.De, 2017).

⁷⁸³ Arendt, p. 253.

private spheres if the prevailing sentiment in either is illiberal and reactionary. Arendt alluded to this in terms of “the tendency of public power to expand and to trespass on private interests”⁷⁸⁴ in the pre-modern era, although she did not formulate it in terms of values. The solution, reflecting “Jefferson’s preoccupation with the dangers of public power and this remedy against them”⁷⁸⁵ was the legal bulwark provided by the Bill of Rights. As seen in Chapter 4, however, this was a *legal* wall of separation between the public and private spheres which Jefferson saw as a “legal check” in the “hands of the judiciary”⁷⁸⁶. But then, having erected a legal barrier to protect private interests from public power, the question then became how to pierce or break down that barrier to ensure that the ‘protected’ citizen retained an affinity or even affection for their government.⁷⁸⁷ Therein lies the problem, though not perhaps an insurmountable one.

Jefferson’s concern on protecting private interests from state power while also ensuring the individual stays involved in upholding their government is, I have suggested, effectively trying to answer the same existential question as Böckenförde posed: how to preserve representative democracy and its constitutional guarantees while retaining the bond between the people and their government? Jefferson saw the answer was through the citizen playing an active role in government at their local level, for, as Arendt notes, “no one could be called either happy or free without participating, and having a share, in public power.”⁷⁸⁸ For Böckenförde, the dilemma and the answer lay in how to ensure that the “internal bonding forces” that the state could draw on—whether religion or nation—could support the values of the liberal secular state and the “opportunity for liberty” that provides.⁷⁸⁹

The U.S. Supreme Court’s intervention in the reapportionment cases was regarded as highly successful. By restoring truly representative government at the state and congressional level and enunciating the principle of one person one vote, the Court illustrated its institutional ability to correct deficiencies in electoral processes, as John Hart Ely argued.⁷⁹⁰ However, the lasting impact of its reapportionment decisions were incrementally eroded through a resurgence of gerrymandering, while the Supreme

⁷⁸⁴ Ibid. p. 252.

⁷⁸⁵ Ibid.

⁷⁸⁶ See *supra* note 286.

⁷⁸⁷ As Jefferson put it, “love your neighbour as yourself, and your country more than yourself.” Cited in Arendt, p. 253.

⁷⁸⁸ Ibid. p. 255.

⁷⁸⁹ Böckenförde, p. 46.

⁷⁹⁰ Ely.

Court's more limited role means that it has been able to do nothing to improve the quality of the civic space or prevent the collapse of the centre-ground in U.S. politics. While the *BVerfG*'s interventions in the European Parliament cases were methodologically suspect and ill-timed, the Court's decades long role as the guardian of German democracy has helped foster a strong constitutional democracy against all the odds.

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